Saint Louis University Law Journal
Spring 2008

Teaching Intellectual Property Law

Article

*905 TEACHING RIGHTS OF PUBLICITY: BLENDING COPYRIGHT AND TRADEMARK, COMMON LAW AND STATUTES, AND DOMESTIC AND FOREIGN LAW [FNa1]

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Introduction

Rights of publicity are the neglected stepchild in the family of intellectual property rights. Among the leading intellectual property casebooks, most include only two or three cases concerning rights of publicity. [FN1] Thus, in a typical survey course on intellectual property, rights of publicity often receive no more than one or two class sessions during the course of a semester. Even in casebooks devoted specifically to trademark and unfair competition, copyright, or entertainment law, rights of publicity often are covered only as an ***906** additional subsidiary topic, [FN2] and usually receive no more than two class sessions, or perhaps two weeks (four class sessions) at the most. (Some first-year property casebooks use the right of publicity to introduce the subject of intellectual property; [FN3] and some first year torts casebooks include rights of publicity in a discussion of privacy law; [FN4] but again, typically only one or two cases are explored.)

There are at least three possible reasons for this neglect. First, unlike patent, trademark, and copyright, rights of publicity are governed by a patchwork quilt of state statutes and common-law decisions, rather than by a ***907** single federal statute; [FN5] and unlike trade secret law, rights of publicity are not the subject of a uniform state law adopted in the vast majority of states, [FN6] in addition to a federal criminal law. [FN7] Second, with the exception of performers' rights in their performances (which comprise only a small subset of rights of publicity), [FN8] rights of publicity are not subject to any international conventions or agreements providing for international protection. [FN9] Third, the relative lack of attention given to rights of publicity may, to some extent, reflect the relative amount of litigation that actually occurs among the major branches of intellectual property law. [FN10]

We believe, however, that these reasons do not justify the relative neglect that rights of publicity currently receive. During the past eight years, each of us has taught a stand-alone course on rights of publicity at least four times. The course has varied greatly in format and in content over that time. It began as a one-unit intersession course, taught for ten classes of one-and-a-half hours each, twice a day for one week. It was expanded to a two-unit course in comparative rights of publicity, with foreign materials integrated throughout the course, for an overseas summer program; and it has also been taught as a two-unit, semester-long course devoted

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primarily to U.S. law, with a small comparative law component. Over time, we have developed a set of illustrated course materials that can be used with any of these permutations. [FN11]

The purpose of this Article is to explain why we believe that rights of publicity should be taught as a stand-alone course, why we believe that a course in comparative rights of publicity is worthwhile as a stand-alone course, ***908** and to explain some of the challenges and opportunities that the course presents. Ultimately, we hope to encourage and persuade more of our colleagues at other schools to begin to offer rights of publicity as a separate course.

I. Why Teach Rights of Publicity?

We believe that a stand-alone course in rights of publicity is valuable and is worth teaching for at least five reasons.

First, a course in rights of publicity provides an excellent vehicle for exploring the theoretical justifications and rationales for intellectual property law in general. At various times, courts have invoked as reasons for recognizing rights of publicity all of the major theories underlying other branches of intellectual property: utilitarian, incentive-based rationales; [FN12] economic efficiency rationales; [FN13] natural rights theories; [FN14] misappropriation and unjust enrichment theories; [FN15] and consumer protection. [FN16] But while ***909** utilitarian, incentive-based rationales are historically important in both patent and copyright law, [FN17] for rights of publicity those rationales seem to have been an afterthought, as the first mention of such a rationale came twenty-four years after the right of publicity was first recognized. [FN18] Indeed, the right of publicity has been defined as "the inherent right of every human being to control the commercial use of his or her identity," [FN19] making it the closest thing we have in the United States to an intellectual property right based purely on a natural rights theory. Rights of publicity therefore provide a good vehicle to explore the advantages and disadvantages of a natural rights theory: Does a natural rights theory provide greater or less flexibility to respond to new problems? If the right of publicity is a natural right, what are its boundaries and limitations? Should it be inheritable after death? [FN20] If so, how long should the right of publicity last? [FN21]

***910** Second, rights of publicity overlap with and therefore provide a good comparison and a good complement to other types of intellectual property. For example, rights of publicity in live performances can also be analyzed under the rubric of common-law copyright in unfixed works of authorship. [FN22] Cases involving rights in characters [FN23] and re-uses of copyrighted works raise the issue of overlap with and possible preemption by federal copyright law. [FN24] Remedies [FN25] and some defenses (such as the first-sale doctrine [FN26]) are similar to those available in copyright [FN27] and trademark, [FN28] but other limiting doctrines (such as the idea/expression dichotomy and the fair use doctrine in copyright law, [FN29] and descriptive and nominative fair use in trademark law [FN30]) have no equivalents in rights of publicity, which sometimes leads to different outcomes. Rights of publicity also provide a good comparison with the consumer protection theory of trademark law. [FN31] Section 43(a) of the Lanham ***911** Act provides a cause of action against anyone falsely suggesting that a celebrity sponsors or endorses a product or service. [FN32] If that is the case, do we need a separate right of publicity? [FN33] What types of uses does it cover that a false endorsement rationale would not? [FN34] To the extent that a rights of publicity course overlaps with other intellectual property courses, it provides an opportunity to reinforce concepts learned in those courses, or to cover in more detail concepts abbreviated elsewhere for lack of time. The course also can draw upon and reinforce tort and property concepts from first-year courses, [FN35] providing additional opportunities for useful discussions.

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Third, rights of publicity are also an excellent vehicle for demonstrating and discussing the differences between common-law and statutory approaches, and the interaction between them. The right of publicity began as an offshoot of the common-law right of privacy, which was first proposed as a separate theory in the famous law review article by Warren and Brandeis. [FN36] Starting from contradictory common-law results, [FN37] a "right of publicity" claim ***912** eventually emerged from a federal court's Erie [FN38] guess about New York common law, [FN39] and soon spread to other states. [FN40] By contrast, state statutes have more recently become a favored solution. [FN41] The course thus allows the ***913** professor to have students compare the merits of common-law approaches (flexibility, for example) with the merits of statutory solutions (promoting predictability and legitimacy from a separation of powers standpoint). A corollary benefit is the ability to compare approaches from different states and to reflect on the merits of a state-by-state approach versus a uniform solution. [FN42]

Fourth, because both common-law and statutory rights of publicity have relatively few built-in mechanisms for accommodating free speech concerns, [FN43] they are almost always met with a defense based on the First Amendment to the U.S. Constitution. [FN44] The course therefore also provides an excellent vehicle for exploring the limits of the First Amendment and the virtues and disadvantages of constitutional decision-making on such a routine basis. Nearly half of the course is devoted to exploring free speech issues that arise in response to right of publicity actions. Under what circumstances should the First Amendment provide a defense to the right of publicity in the context of news reporting? [FN45] When should parody and satire be protected? [FN46] Should the ***914** First Amendment protect artists who depict celebrities in works of art? [FN47] What about fictionalized portrayals of real people? [FN48] For anyone who is interested in First Amendment jurisprudence and the protection of freedom of speech, the conflict between the First Amendment and a relatively broad intellectual property right based on "natural rights" theory provides an unforgettable means of exploring these issues. [FN49]

Finally, teaching rights of publicity is just plain fun. The cases are inherently interesting, because they involve famous celebrities and pop culture of today and of an earlier era, [FN50] and because of the clash of fundamental values of personal identity and integrity versus freedom of expression. In addition, the class is filled with opportunities to use visual examples, which helps keep the students interested and actively engaged. [FN51] Over time, we have collected many such examples, from the advertisements at issue in the original right of privacy cases, [FN52] to genuine limited-edition copies of the artworks at issue in the Three Stooges case [FN53] and the Tiger Woods case. [FN54] Students enjoy seeing these ***915** illustrations, and sometimes they change their view of the case after viewing the actual works, which may help students understand motives for litigation and judicial decision-making that may go unstated or unexpressed in the case reports. In turn, students begin to see examples in the media and to bring them to class, which helps stimulate class discussion.

II. Why Teach Comparative Rights of Publicity?

While not essential, a comparative [FN55] approach to the course offers many virtues. As more and more law school curricula include comparative and international courses, the inclusion of such material is becoming more commonplace, even in basic courses. [FN56] Globalization, epitomized by the TRIPS Agreement, [FN57] makes knowledge of non-U.S. law an appropriate and important part of an intellectual property student's education. Our primary intent is not to teach the details of the laws of several countries (although ideally we would like students to begin to grasp some of those details). ***916** Instead, we want students to see in a general way how other countries approach similar problems, finding many similarities, but many differences as well.

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Organizationally, we put the foreign materials at the end of each topic, so that there is comparative material to use for almost every topic (although a few topics do not have readily available foreign material). This approach seems superior to going through the entire course twice, although it does mean that students will encounter the foreign material before they have a complete picture of U.S. law.

The use of foreign material presents certain challenges, but we believe the value added clearly outweighs the challenges. Obviously, finding materials in English is an issue, and translating foreign language material is daunting (and beyond our individual capabilities in most cases). But many primary and secondary materials, including court cases and law review articles, are available in English [FN58] (including materials from Canada, Australia, and the United Kingdom). [FN59] Although the quantity is dwarfed by the body of available U.S. material, it is more than sufficient for the pedagogical task.

The greater challenge--and the greater reward--lies in comparing U.S. and foreign law. On the surface, the approaches may appear fairly similar. Many countries have some sort of protection against non-consensual commercial uses of celebrity images, though often under unfamiliar rubrics. [FN60] Further, the idea of free expression, so central to a discussion of rights of publicity under U.S. law, exists in democratic countries all over the world. [FN61] However, the implementation of these legal principles in different countries reflects local nuances and cultural/legal norms and distinctions not easily grasped by an "issue, rule, conclusion" approach to the materials. Rather, there is a kind of gestalt, which may be reflected in different results than might be expected in a U.S. court, but which really derives from different background legal norms. Differences in the way countries approach free speech problems, for example, can lead to wonderful discussions of community oriented, as ***917** opposed to individually oriented, norms. This often requires the professor to point out the subtleties, or at least to give sufficient guidance to students so that they may discover them for themselves. [FN62] But there is great value in having students learn that democratic societies can approach similar problems using similar-sounding tools, but from very different perspectives. [FN63]

One can also use the foreign materials to discuss both differences and similarities between common-law systems and civil law systems, and the extent to which each of those systems may be borrowing from the other. [FN64] To the extent that the course includes foreign common-law materials (e.g., from the United Kingdom, Canada, and Australia), it provides an opportunity to discuss the roots of tort and property law, and the divergent developments in each country, should the professor so desire. [FN65]

In the end, including comparative materials makes students aware that U.S. law does not exist in a vacuum, and we hope, doing so gives them a wider perspective as they begin to practice, and even reform, the law.

III. Challenges in Teaching Rights of Publicity

Teaching rights of publicity is not entirely fun and games. There are some important challenges. But meeting those challenges provides students with valuable learning experiences. Two of these challenges are discussed below.

***918** A. Student Background Differences

We do not have prerequisites for this course; we believe that the great majority of the material does not require a background beyond what upper-level students generally bring to a course. However, this means that stu-

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dents in the class vary widely in their prior knowledge of intellectual property, from little or none to relatively extensive. [FN66] One problem is that students often believe that those with some prior knowledge of intellectual property have a significant advantage. We believe such an advantage is slight-- knowledge of trademark law, particularly Section 43(a) of the Lanham Act, may be useful, but the level of understanding of likelihood of confusion needed for rights of publicity is not complex. [FN67] There are also a couple of points where copyright concepts enter--preemption and first sale most notably. [FN68] A little explanation of the concepts by the professor goes a long way here. (Alternatively, one may choose to omit that material.) Even where some slight advantage exists from prior knowledge of intellectual property law, we have not observed students being actively discouraged by it. Students of all backgrounds can engage in a useful discussion about the utility of importing concepts from other intellectual property regimes into rights of publicity.

A related problem is that students who have taken copyright or trademark may have seen some of the cases before. [FN69] This is not an unknown ***919** phenomenon in law teaching. Federal Courts, for example, uses a number of cases that students may have encountered in Civil Procedure or Constitutional Law courses. The "trick" (and it really is not a trick) is to put the cases into a new context. In the rights of publicity course, students are exposed to many cases they have not seen before; comparing the familiar cases to the new ones is a simple way of "transforming" a familiar case into something new. [FN70]

Here is an example. The suit brought by Vanna White against Samsung [FN71] concerning an advertisement depicting a robot in front of a "Wheel of Fortune" game board is commonly used in other intellectual property courses in their rights of publicity sections. [FN72] In a trademark course, one might usefully discuss whether Vanna White's invocation of the federal trademark statute was appropriate, in addition to discussing some of the basic aspects of California's right of publicity laws. [FN73] In a copyright course, one might logically discuss the preemption issue raised by Judge Kozinski's dissent from the denial of rehearing en banc, [FN74] as well as pertinent aspects of rights of publicity law. [FN75] But neither course is likely to focus on another interesting aspect of the case: the extent to which White's claim was a substitute for a defamation cause of action, thereby avoiding the constitutional protection given to the latter. [FN76] Moreover, this issue is most usefully discussed in connection with other rights of publicity cases, which may not be available in a trademarks or copyright ***920** casebook. [FN77] Of course, one could raise the defamation issue in a trademarks or copyright course, but the issue has less of a logical connection to either of those courses. We believe the defamation issue is better discussed in the context of a separate rights of publicity course, where the tort background of the claim can be brought to bear on the defamation problem.

B. Knowledge of Constitutional Law

Students in the course also vary in the depth of their knowledge of constitutional law in general, and First Amendment law in particular. Second-year students may not have reached the topic at all; and, as constitutional law professors become more pressed for time as the material expands, freedom of speech in a commercial context may receive little attention. A rights of publicity course presents a welcome opportunity to fill this gap and to expand the students' horizons by putting First Amendment law into a new context. [FN78]

Moreover, First Amendment analyses of intellectual property are too often given short shrift by courts. [FN79] Giving students a solid grounding in the relevant constitutional law principles in the context of an intellectual property course will make them better advocates for their clients and less likely to overlook, or to inadequately analyze, the applicability of constitutional law to intellectual property. [FN80] These principles are

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also relevant to trademark and copyright ***921** law, [FN81] but such courses must cover a large body of law, and professors may not be able to give constitutional issues significant class time. As noted above, a rights of publicity course is an excellent vehicle for integrating constitutional law principles into an intellectual property course. [FN82]

Conclusion

Before concluding, we should expressly acknowledge that like many (but by no means all) academics, we share the belief that the balance between intellectual property and freedom of speech has tipped too far toward overprotection of content owners and away from the public domain. But regardless of where one stands on these issues, it should be clear that rights of publicity form an important part of the fabric of intellectual property and an important and visible battleground in the free speech debate. We hope that setting forth our thoughts about the course, and making our course materials available to others, will encourage and persuade more of our colleagues at other schools to offer rights of publicity as a stand-alone course in the near future.

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[FN1]. See, e.g., Margreth Barrett, Intellectual Property: Cases and Materials 1098-1133 (3d ed. 2007) (three principal cases); Rochelle Cooper Dreyfuss & Roberta Rosenthal Kwall, Intellectual Property: Cases and Materials on Trademark, Copyright and Patent Law 538-63 (2d ed. 2004) (two principal cases); Paul Goldstein, Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on the Law of Intellectual Property 178-215 (rev. 5th ed. 2004) (three principal cases); Robert P. Merges, Peter S. Menell & Mark A. Lemley, Intellectual Property in the New Technological Age 883-913 (4th ed. 2006) (three principal cases); Craig Allen Nard, David W. Barnes & Michael J. Madison, The Law of Intellectual Property 234-42 (2006) (one principal case). Two casebooks published in 2007 have four principal cases each. See Shubha Ghosh, Richard Gruner, Jay P. Kesan & Richard I. Reis, Intellectual Property: Private Rights, the Public Interest, and The Regulation of Creative Activity 630-66 (2007); David Lange, Mary LaFrance & Gary Myers, Intellectual Property: Cases and Materials 278-346 (3d ed. 2007).

[FN2]. See, e.g., Graeme B. Dinwoodie & Mark D. Janis, Trademarks & Unfair Competition: Law & Policy 783-827 (2d ed. 2007) (five principal cases); Jane C. Ginsburg, Jessica Litman & Mary L. Kevlin, Trademark and Unfair Competition Law: Cases and Materials 675-723 (4th ed. 2007) (five principal cases); Ralph S. Brown & Robert C. Denicola, Cases on Copyright, Unfair Competition and Related Topics Bearing on the Protection of Works of Authorship 806-45 (9th ed. 2005) (four principal cases); Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in a Global Information Economy 676-88 (2d ed. 2006) (three principal cases); Robert A. Gorman & Jane C. Ginsburg, Copyright: Cases and Materials 1005, 1026-31 (7th ed.

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2006) (one principal case); Craig Joyce, Marshall Leaffer, Peter Jaszi & Tyler Ochoa, Copyright Law 974-85 (7th ed. 2006) (one principal case).

There are two casebooks that are exceptions to the rule and that include a generous set of materials for teaching rights of publicity, although we wonder how many teachers using these books are able to devote more than a handful of class sessions to the topic. See Sheldon W. Halpern, The Law of Defamation, Privacy, Publicity, and Moral Right: Cases and Materials on Protection of Personality Interests 524-634 (4th ed. 2000) (eighteen principal cases); Melville B. Nimmer, Paul Marcus, David A. Myers & David Nimmer, Cases and Materials on Copyright and Other Aspects of Entertainment Litigation Including Unfair Competition, Defamation, Privacy, Illustrated 1191-1341 (7th ed. 2006) (thirteen principal cases).

[FN3]. See, e.g., Jesse Dukeminier, James E. Krier, Gregory S. Alexander & Michael H. Schill, Property 62-65 (6th ed. 2006) (one principal case); Paul Goldstein & Barton H. Thompson, Jr., Property Law: Ownership, Use, and Conservation 281-83 (2006) (notes only); Sheldon F. Kurtz & Herbert Hovenkamp, Cases and Materials on American Property Law 86-102 (5th ed. 2007) (one principal case); Edward H. Rabin, Roberta Rosenthal Kwall & Jeffrey L. Kwall, Fundamentals of Modern Property Law 1267-68, 1275-91 (5th ed. 2006) (two principal cases); Joseph William Singer, Property Law: Rules, Policies, and Practices 1129-40 (4th ed. 2006) (one principal case).

[FN4]. See, e.g., George C. Christie, James E. Meeks, Ellen S. Pryor & Joseph Sanders, Cases and Materials on the Law of Torts 8-17, 1314-18, 1370-81 (4th ed. 2004) (three principal cases); Richard A. Epstein, Cases and Materials on Torts 1082-99 (8th ed. 2004) (three principal cases); Marc A. Franklin, Robert L. Rabin & Michael D. Green, Tort Law and Alternatives: Cases and Materials 1208-28 (8th ed. 2006) (two principal cases); Victor E. Schwartz, Kathryn Kelly & David F. Partlett, Prosser, Wade & Schwartz's Torts 939-52 (11th ed. 2005) (one principal case); Harry Shulman, Fleming James, Jr., Oscar S. Gray & Donald G. Gifford, Cases and Materials on the Law of Torts 1202-06 (4th ed. 2003) (one principal case).

[FN5]. Compare 15 U.S.C. §§ 1051-1129 (2000) (trademark), 17 U.S.C. §§ 101-805 (2000) (copyright), and 35 U.S.C. §§ 1-376 (2000) (patent), with 1 J. Thomas McCarthy, Rights of Publicity and Privacy §§ 6:3, 6:8 (2d ed. 2007).

[FN6]. See Uniform Trade Secrets Act (1985), available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utsa85.pdf (last visited Jan. 15, 2008); 1 Roger M. Milgrim, Milgrim on Trade Secrets § 1.01[2][b] (2007) (listing 43 states that have adopted the UTSA).

[FN7]. See Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839 (2000).

[FN8]. See 2 McCarthy, supra note 5, §§ 8:103-8:108.

[FN9]. For performers' rights, see International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations arts. 4, 7, done Oct. 26, 1961, 496 U.N.T.S. 43 (Rome Convention); Agreement on Trade-Related Aspects of Intellectual Property Rights art. 14(1), concluded Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; World Intellectual Property Organization Performances and Phonograms Treaty arts. 5-10, Dec. 20, 1996, S.Treaty Doc. No. 105-17, at 18 (1997), 36 I.L.M. 76.

[FN10]. Thus, a search of the Westlaw database CTAR (Reported Court of Appeals cases) for the years 2000 to 2006 resulted in 802 patent cases (headnote 291k!), 397 trademark cases (headnote 382k! & trademark), and 280

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copyright cases (headnote 99k!), but only 19 cases involving rights of publicity, together with an additional 65 cases involving rights of publicity in the ALLSTATES database, for a total of 84 cases involving rights of publicity (headnote 379IV(C)).

[FN11]. We hope to publish these materials as a casebook in the near future. For the time being, these illustrated course materials are available from the authors on request.

[FN12]. See, e.g., Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) ("[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment."); id. at 576 ("[T]he protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. The same consideration underlies the patent and copyright laws long enforced by this Court."). But see Cardtoons, L.C. v. Major League Baseball Players Ass'n., 95 F.3d 959, 973-74 (10th Cir. 1996) (considering and rejecting this rationale outside the context of a performer's performances); Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125, 206-19 (1993).

[FN13]. See, e.g., Cardtoons, 95 F.3d at 974 ("The second economic justification for the right of publicity is that it promotes the efficient allocation of resources, a version of the familiar tragedy of the commons argument used to prove the superiority of private property over common property."); Richard A. Posner, Economic Analysis of Law 45 (7th ed. 2007); Mark F. Grady, A Positive Economic Theory of the Right of Publicity, 1 UCLA Ent. L. Rev. 97, 110-26 (1994). But see Madow, supra note 12, at 220-25 (criticizing this theory).

[FN14]. See, e.g., ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 928 (6th Cir. 2003) ("The right of publicity ... has been defined as the inherent right of every human being to control the commercial use of his or her identity.") (quoting 1 McCarthy, supra note 5, § 1:3); Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 71 (Ga. 1905) ("The right of privacy within certain limits is a right derived from natural law."); see also 1 McCarthy, supra note 5, § 2:2 (discussing natural rights theory). But see Madow, supra note 12, at 136-37 (finding natural rights theories unpersuasive).

[FN15]. See, e.g., Zacchini, 433 U.S. at 576 ("The rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of good will." (internal quotation marks and alterations omitted)); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983) ("Vindication of the right [of publicity] will also tend to prevent unjust enrichment by persons such as appellee who seek commercially to exploit the identity of celebrities without their consent."); State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987) ("[The right of publicity] recognizes one of the basic principles of Anglo-American jurisprudence that one may not reap where another has sown nor gather where another has strewn." (internal quotation marks omitted)). This rationale is entirely circular; any enrichment that occurs is only "unjust" if one assumes that the celebrity has a right to benefit from his or her fame in the first place. See Madow, supra note 13, at 179-205.

[FN16]. See, e.g., Cardtoons, 95 F.3d at 975; Elvis Presley Int'l Mem'l Found., 733 S.W.2d at 99 ("[R]ecognizing ... the right of publicity ... will further the public's interest in being free from deception with regard to the sponsorship, approval or certification of goods and services."); Restatement (Third) of Unfair Competition § 46 cmt. c (1995); 1 McCarthy, supra note 5, § 2:8. But see Madow, supra note 12, at 228-38 (questioning this rationale).

[FN17]. See U.S. Const. art. I, § 8, cl. 8; Joyce, Leaffer, Jaszi & Ochoa, supra note 2, at 14-20, 52-54; Tyler T.

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Ochoa and Mark Rose, The Anti-Monopoly Origins of the Patent and Copyright Clause, 49 J. Copyright Soc'y USA 675, 694-95, 701 (2002).

[FN18]. See Zacchini, 433 U.S. at 573.

[FN19]. See 1 McCarthy, supra note 5, §1:3 (emphasis added).

[FN20]. Compare Lugosi v. Universal Pictures, 603 P.2d 425, 431, 25 Cal. 3d 813, 824, 160 Cal. Rptr. 323, 329 (Cal. 1979) (common-law right of publicity is not descendible), with Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705, 250 Ga. 135, 145 (1982) (common-law right is descendible and inheritable).

[FN21]. Currently, in those states that have a statutory post-mortem right of publicity, the duration of the right ranges from 20 years after the death of the person, see Va. Code Ann. § 8.01-40(B) (2007), to 100 years after the death of the person, see Ind. Code Ann. § 32-36-1-8(a) (LexisNexis 2002); Okla. Stat. Ann. tit. 12, § 1448(G) (West 1993), to indefinitely, so long as the right is exploited, see Tenn. Code Ann. § 47-25-1104 (2001). See generally 2 McCarthy, supra note 5, § 9:18. We are not aware of any judicial decision that recognizes a post-mortem common-law right of publicity that has expressly addressed how long the right should last or whether it should extend in perpetuity. See, e.g., Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 n.10 (D.N.J. 1981) ("Since we are not directly faced with the issue of whether there should be a durational limit on the right of publicity after it is inherited, we will not decide the question."). Indeed, the difficulty of judicially fixing a durational limit was cited as one of the reasons for declining to recognize a common-law post-mortem right of publicity in Lugosi. 603 P.2d at 430, 25 Cal. 3d at 822, 160 Cal. Rptr. at 328; see also id. at 433-34; 25 Cal. 3d at 827-28; 160 Cal. Rptr. at 331-32 (Mosk, J., concurring). But see id. at 446-47; 25 Cal. 3d at 847; 160 Cal. Rptr. at 344-45 (Bird., C.J., dissenting) (suggesting adoption of the then-existing copyright duration of life plus 50 years for the common-law right of publicity).

[FN22]. See, e.g., Zacchini, 433 U.S. at 564-65 (1977) (noting that a majority of the Ohio Court of Appeals analyzed the cause of action as infringement of a common-law copyright, whereas one concurring judge and the Ohio Supreme Court analyzed it as a right of publicity); 17 U.S.C. § 301(b)(1) (2000) (expressly permitting state law regulation of "works of authorship not fixed in any tangible medium of expression"); 2 McCarthy, supra note 5, §§ 8:104-8:105.

[FN23]. See, e.g., McFarland v. Miller, 14 F.3d 912, 918-22 (3d Cir. 1994) (contract with movie studio did not divest plaintiff of right to sue for use of character name Spanky McFarland); Lugosi, 603 P.2d 425, 432, 25 Cal. 3d 813, 824-25, 160 Cal. Rptr. 323, 330 (Mosk, J., concurring) (distinguishing Lugosi as an individual from Lugosi in his role as Count Dracula).

[FN24]. See, e.g., Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1135-36 (9th Cir. 2006) (action for use of voice in licensed sample from authorized sound recording was preempted by copyright law); Toney v. L'Oreal USA, Inc., 406 F.3d 905, 909-11 (7th Cir. 2005) (action for use of photo on product packaging was not preempted by copyright law); Wendt v. Host Int'l, Inc., 35 U.S.P.Q. 2d 1315, 1316 (9th Cir. 1995) (action for use of robots based on television characters was not preempted by copyright law), on appeal after remand, 125 F.3d 806 (9th Cir. 1997), reh'g denied, 197 F.3d 1284 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc).

[FN25]. See, e.g., Cal. Civ. Code § 3344(a) (West 1997) (providing for actual damages or statutory damages of

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$750, in addition to infringer's profits, punitive damages, costs, and attorneys' fees).

[FN26]. See, e.g., Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1449 (11th Cir. 1998) (recognizing the first-sale doctrine as a defense to resale of authorized celebrity merchandise).

[FN27]. See 17 U.S.C. § 504 (providing for actual damages plus infringer's profits, or statutory damages of between $750 and $30,000); 17 U.S.C. § 505 (providing for recovery of costs and attorneys' fees); 17 U.S.C. § 109(a) (codifying first-sale doctrine).

[FN28]. See 15 U.S.C. § 1117(a) (2000) (providing for up to three times actual damages, infringer's profits, costs, and attorneys fees); Sebastian Int'l, Inc. v. Longs Drug Stores Corp., 53 F.3d 1073, 1074-77 (9th Cir. 1995) (summarizing first-sale doctrine under trademark law).

[FN29]. See 17 U.S.C. § 102(b) (idea/expression dichotomy); 17 U.S.C. § 107 (fair use doctrine).

[FN30]. See 15 U.S.C. § 1115(b)(4) (descriptive fair use); New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 308 (9th Cir. 1992) (nominative fair use).

[FN31]. See Stacey L. Dogan & Mark A. Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 Stan. L. Rev. 1161, 1190-1208 (2006).

[FN32]. See 15 U.S.C. § 1125(a)(1) (“Any person who ... uses in commerce any ... device, or any ... 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, ... shall be liable in a civil action.”); see, e.g., White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399-1401 (9th Cir. 1992); Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 625-26 (S.D.N.Y. 1985).

[FN33]. Cf. ETW Corp., v. Jireh Publ'g, Inc., 332 F.3d 915, 924 (6th Cir. 2003) (“The elements of a Lanham Act false endorsement claim are similar to the elements of a right of publicity claim under Ohio law. In fact, one legal scholar has said that a Lanham Act false endorsement claim is the federal equivalent of the right of publicity.”); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1111 (9th Cir. 1992) (vacating award of damages under Section 43(a) of Lanham Act as duplicative of damages under state-law right of publicity).

[FN34]. There are at least two answers to this rhetorical question. First, the right of publicity covers celebrity merchandising cases, a use that is well established, but still controversial, for trademarks under the Lanham Act. See, e.g., Au-tomotive Gold, Inc. v. Volkswagen of Am., Inc., 457 F.3d 1062 (9th Cir. 2006); Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004 (5th Cir. 1975); see also Stacey L. Dogan & Mark A. Lemley, The Merchandising Right: Fragile Theory or Fait Accompli?, 54 Emory L.J. 461 (2005). Second, the right of publicity relieves plaintiffs of the burden of having to demonstrate the elements of use in commerce, secondary meaning, and likelihood of confusion under the Lanham Act. See Dogan & Lemley, supra note 31, at 1208-13.

[FN35]. See supra notes 3-4 and accompanying text.

[FN36]. See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[FN37]. Compare Pavesich v. New England Life Ins. Co., 50 S.E. 68, 122 Ga. 190 (1905) (allowing claim in fa-

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vor of a person whose photograph was used commercially without permission), with Roberson v. Rochester Folding Box Co., 64 N.E. 442, 171 N.Y. 538 (1902) (denying a right of action under circumstances similar to Pavesich). Roberson was legislatively overruled the next year. See Act of Apr. 6, 1903, ch. 132, §§ 1-2, 1903 N.Y. Laws 308 (codified as amended at N.Y. Civ. Rights Law §§ 50-51 (McKinney 1992 and Supp. 2007)).

[FN38]. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[FN39]. See Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) ("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 .... This right might be called a 'right of publicity.'"). The federal court's guess turned out to be faulty; the New York Court of Appeals disavowed the common-law doctrine thirty years later, see Stephano v. News Group Publ'ns, 474 N.E.2d 580, 584, 64 N.Y.2d 174, 183, 485 N.Y.S.2d 220, 224 (1984) ("Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which ... is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity"), leaving New York with only a statutory right limited to living persons. See N.Y. Civ. Rights Law § 50 (McKinney 1992) ("A person ... [who] uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person ....") (emphasis added). There have been occasional efforts to enact a post-mortem right of publicity in New York, including two bills introduced in 2007. See S. 6005, 2007 S., 230th Sess. (N.Y. 2007); Assemb. 8836, 2007 Assemb., 230th Sess. (N.Y. 2007). Those bills have been tabled until the fall session convenes. See American Society of Media Photographers, Legislative Alert, available at www.asmp.org/news/spec2007/NY_publicity_bill.php (last visited Jan. 15, 2008); Jordana Lewis, Long-Dead Celebrities Can Now Breathe Easier, N.Y. Times, Oct. 24, 2007 at B4.

[FN40]. See, e.g., Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834-35, 834 n.1 (6th Cir. 1983) (Michigan law); Estate of Presley v. Russen, 513 F. Supp. 1339, 1353-56 (D.N.J. 1981) (New Jersey law); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 90 Wis. 2d 379 (1979) (Wisconsin law). For a complete list of states that have adopted the right of publicity as a common-law right, see 1 McCarthy, supra note 5, § 6.3 .

[FN41]. New York was an early convert. See supra note 39. California's statute dates from 1971. Act of Nov. 22, 1971, ch. 1595, § 1, 1971 Cal. Stat. 3426 (codified as amended at Cal. Civ. Code § 3344 (West 1997)). However, California continues to recognize a common-law right for living persons alongside the statutory one. See, e.g., White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397-99 (9th Cir. 1992) (finding no violation of the statutory right of publicity, but finding a violation of the common-law right of publicity); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (same); Eastwood v. Super. Ct. of L.A. County, 198 Cal. Rptr. 342, 346, 149 Cal. App. 3d 409, 416-17 (Cal. Ct. App. 1983) (detailing differences between the statutory right and the common-law right). The California legislature also added an express post-mortem right when the courts refused to recognize a common-law one. See Lugosi v. Universal Pictures, 603 P.2d 425, 431, 25 Cal. 3d 813, 824, 160 Cal. Rptr. 323, 329 (Cal. 1979) (no common-law post-mortem right); 1984 Cal. Stat. ch. 1704, § 1 (codified as amended at Cal. Civ. Code § 3344.1 (West Supp. 2007)); cf. Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 317 (S.D.N.Y. 2007); Milton H. Greene Archives, Inc., v. CMG Worldwide, Inc., No. CV-05-2200-MMM (C.D. Cal. May 14, 2007) (declining to apply the statutory post-mortem right retroactively to celebrities predeceasing the date of enactment). The California legislature has enacted an amendment in an attempt to overturn these two decisions. See Act of Oct. 10, 2007, ch. 439, § 1 (eff. Jan. 1, 2008) (adding Cal. Civ. Code §3344.1(p), which reads "The rights recognized by this section are expressly made

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retroactive, including to those deceased personalities who died before January 1, 1985."); id. § 2 (expressing the intent of the legislature). Similar bills were introduced in New York in an attempt to overturn the Shaw decision. See supra note 39.

[FN42]. This also may reinforce and/or illuminate concepts learned in first-year courses.

[FN43]. The New York statute requires that the use be "for advertising purposes or for the purposes of trade." N.Y. Civ. Rights Law § 51 (McKinney Supp. 2007). The California statutes require that the use be "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services," Cal. Civ. Code § 3344(a) (West 1997), § 3344.1(a) (West Supp. 2007), and they contain an express exception for news, public affairs and sports reporting. Cal. Civ. Code § 3344(d) (West 1997), § 3344.1(j) (West Supp. 2007). But the common-law right of publicity in California requires only "appropriation of the plaintiff's name or likeness to defendant's advantage, commercially or otherwise." See Eastwood, 198 Cal. Rptr. at 347, 149 Cal. App. 3d at 417 (emphasis added).

[FN44]. See U.S. Const., amend. I ("Congress shall make no law ... abridging freedom of speech, or of the press."); cf. Madow, supra note 12, at 145-46 ("[T]he power to license is the power to suppress. When the law gives a celebrity a right of publicity, it ... gives her (or her assignee) a substantial measure of power over the production and circulation of meaning and identity in our society ...; power, ultimately, to limit the expressive and communicative opportunities of the rest of us.").

[FN45]. See, e.g., Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 569, 578-79 (1977) (First Amendment does not require protection where a human cannonball's "entire act" was broadcast without his consent); Eastwood, 198 Cal. Rptr. at 352, 149 Cal. App. 3d at 425-26 (First Amendment does not protect deliberately fictionalized news account if published with knowledge of or in reckless disregard of its falsity); cf. Messenger v. Gruner+Jahr Printing & Publ'g, 727 N.E.2d 549, 553, 94 N.Y.2d 436, 442-43, 706 N.Y.S.2d 52, 56 (N.Y. 2000) (under New York law, plaintiff may not recover for use of her photo to illustrate a newsworthy article, even if it could reasonably be viewed as falsifying her role, unless her picture bore no relationship to the article or was merely an advertisement in disguise).

[FN46]. Compare White, 971 F.2d at 1401 (9th Cir. 1992) (parody advertisement featuring robot in place of Vanna White was not protected by the First Amendment), petition for rehearing denied, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc), with Cardtoons, L.C. v. Major League Baseball Players Ass'n., 95 F.3d 959, 970-76 (10th Cir. 1996) (parody baseball cards are protected under the First Amendment).

[FN47]. Compare Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808-10, 25 Cal. 4th 387, 405-08, 106 Cal. Rptr. 2d 126, 140-42 (Cal. 2001) (First Amendment does not protect reproductions of a "non-transformative" charcoal drawing of the Three Stooges), with ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 936-38 (6th Cir. 2003) (First Amendment protects reproductions of a painting of Tiger Woods).

[FN48]. See, e.g., Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 455-62, 25 Cal. 3d 860, 862-73, 160 Cal. Rptr. 352, 353-60 (Cal. 1979) (Bird, C.J., concurring) (First Amendment protects fictionalized movie portrayal of actor Rudolph Valentino); Gugliemli, 603 P.2d at 464; 25 Cal. 3d at 876, 160 Cal. Rptr. at 362 (Newman, J., concurring); Tyne v. Time Warner Entm't Co., 901 So. 2d 802, 804, 808-10 (Fla. 2005) (First Amendment protects allegedly false portrayal of fishermen in movie The Perfect Storm (2000)).

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[FN49]. See, e.g., Diane Leenheer Zimmerman, Fitting Publicity Rights Into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!, 10 DePaul-LCA J. Art & Ent. L. 283 (2000).

[FN50]. Among the celebrities involved in the cases in our materials are Muhammad Ali, Woody Allen, Johnny Carson, Clint Eastwood, Dustin Hoffman, Bela Lugosi, Groucho Marx, Bette Midler, Elvis Presley, Vanna White, and Tiger Woods.

[FN51]. On the benefits of using visual examples in intellectual property classes generally, see Rebecca Tushnet, Sight, Sound, and Meaning: Teaching Intellectual Property with Audiovisual Materials, 52 St. Louis U. L.J. 891 (2008).

[FN52]. See supra note 37. Both of these advertisements are available on the Internet. See Privacy and Publicity in the Early 20th Century, http:// historyofprivacy.net/Home7.htm (last visited Jan. 15, 2008).

[FN53]. See Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 25 Cal. 4th 387, 106 Cal.Rptr. 2d 126 (2001). Professor Welkowitz authored an amicus brief on behalf of the defendant in the case. See Brief of Amicus Curiae, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 25 Cal. 4th 387, 106 Cal. Rptr. 2d 126 (2001) (No. S 076061).

[FN54]. See ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003). Professor Ochoa recruited seventy-three professors, including Professor Welkowitz, to sign an amicus brief written by Professor Diane Leenheer Zimmerman of New York University School of Law on behalf of the defendant in this case. See Tyler T. Ochoa, Introduction: Tiger Woods and the First Amendment, 22 Whittier L. Rev. 381, 389 (2000); Diane Leenheer Zimmerman, Amicus Curiae Brief of Seventy-Three Law Professors in Support of Jireh Publishing, Inc., 22 Whittier L. Rev. 391 (2000).

[FN55]. Although we use the term “comparative” to describe the foreign materials that we use in our course, that term is not entirely accurate. Most of the material is comparative, in that it includes cases and statutes from other countries to be compared with U.S. law. However, a very small but emerging amount of material might be termed “international,” in the sense that it is intended to set standards for countries adhering to a particular treaty regime. The Universal Declaration of Human Rights is a potential example, although it has not yet been used to set standards for anything resembling rights of publicity. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948). The European Convention on Human Rights, which applies only to the forty-seven member states of the Council of Europe, is another potential source. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; see also, e.g., Von Hannover v. Germany, Case No. 59320/00, [2004] ECHR 294 (holding that Germany violated Art. 8 of the Convention by failing to afford protection to Princess Caroline of Monaco against publication of pictures taken of her in semi-public places by paparazzi); David S. Welkowitz, Privatizing Human Rights? Creating Intellectual Property Rights from the European Human Rights Convention (draft manuscript on file with author).

[FN56]. See, e.g., Mark Tushnet, Integrating Transnational Legal Perspectives Into the First Year Curriculum--Introduction, 24 Penn St. Int'l L. Rev. 735 (2006).

[FN57]. TRIPS is an acronym for the Agreement on Trade Related Aspects of Intellectual Property Rights, which was part of the 1994 Agreement Establishing the World Trade Organization (WTO). See TRIPS Agreement, supra note 9; World Trade Organization, Intellectual Property: Protection and Enforcement, http://

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www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Jan. 15, 2008). However, as noted above, TRIPS has no general prohibition against non-consensual commercial use of celebrity images, and there are no general international conventions protecting celebrity rights as such. See supra note 9 and accompanying text.

[FN58]. See, e.g., F. Jay Dougherty, Symposium: International Rights of Publicity: Foreward: The Right of Publicity--Towards a Comparative and International Perspective, 18 Loy. L.A. Ent. L.J. 421 (1998).

[FN59]. See, e.g., Irvine v. Talksport Ltd., [2002] EWHC (Ch) 367, aff'd in relevant part, [2003] EWCA (Civ) 423, [2003] All E.R. 881 (U.K.).

[FN60]. See, e.g., Stephen R. Barnett, "The Right to One's Own Image": Publicity and Privacy Rights in the United States and Spain, 47 Am. J. Comp. L. 555 (1999).

[FN61]. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 222 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."); Universal Declaration of Human Rights, G.A. Res. 217A, art. 19, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

[FN62]. We do find some greater need for handholding here, as the foreign materials often seem strange to students: the style and length of foreign opinions often differs dramatically from U.S. material. But some advance direction to students about these differences helps alleviate problems; and fortunately, there is nothing in the course to rival the extraordinarily complex opinion structure of World Trade Organization dispute resolution panels.

[FN63]. We should add that if there are students in the class from other countries, they can provide a very interesting perspective on the laws of their own countries. One of us taught this course in a summer abroad program in France in a class that included a few French students, and occasionally foreign students visiting at U.S. law schools have taken our classes. The inclusion of these students, assuming that their language skills are up to the task of participating in an American law school class, can be very useful during class discussions. (The instructor should be aware, however, that most foreign schools utilize far less, if any, Socratic dialogue and student participation than do most American law schools.).

[FN64]. For example, common-law countries like the United Kingdom and the United States are increasingly relying on statutory solutions, whereas civil law countries, especially in Europe, are increasingly tied to systems where courts use cases and precedents, such as the European Court of Justice, the European Court of Human Rights, and the WTO.

[FN65]. Especially with British materials, there is also the opportunity for smaller learning experiences, such as the need to read opinions and count votes carefully, because each judge may issue his or her own opinion, so it may not be obvious who is in the majority and who is dissenting until all opinions are read and all votes are counted. See, e.g., Campbell v. MGN Ltd., [2006] E.M.L.R. 1 (H.L. 2005).

[FN66]. Students may also vary in their knowledge of international law. However, only a very small amount of

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the material is truly international law, as opposed to comparative law, see supra note 55, and very few U.S. students are knowledgeable about the laws of other countries. If the class includes foreign students (or students with such knowledge), that can add to the discussion. See supra note 63. The professor need only take care not to allow such students to monopolize the foreign law discussions.

[FN67]. The "Vanna White" case, White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992), and the "Tiger Woods" case, ETW Corp. v. Jireh Publishing, Inc., 332 F.3d 915 (6th Cir. 2003), include trademark law concepts, especially the latter; but we believe that our editing of the cases allows students to understand the problem even if they have not been exposed to those concepts before. The registration provisions of the Lanham Act contain two relevant provisions: 15 U.S.C. § 1052(a), (c) (2000), the latter being more directly on point. But these provisions occupy a very small part of the right of publicity course; their principal purpose is mostly to illustrate the fact that rights of publicity turn up in unexpected places.

[FN68]. See 17 U.S.C. § 301 (preemption); 17 U.S.C. §109 (first sale doctrine). In addition, the copyright fair use notion of "transformative" use, see Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994), is used in Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 807-10, 25 Cal. 4th 387, 403-07, 106 Cal. Rptr. 2d 126, 139-42 (Cal. 2001); and the California post-mortem right of publicity statute incorporates the federal copyright term of life-plus-seventy years. 17 U.S.C. § 302(a); Cal. Civ. Code § 3344.1(g) (West Supp. 2007). While interesting, the latter point is not critical to a conceptual understanding of the course. We do expressly point out and explain the extent to which the Saderup opinion borrows from federal copyright law.

[FN69]. White, 971 F.2d 1395, reh'g denied, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc), in particular, is a popular case; it appears in the rights of publicity section of all but two of the fifteen casebooks cited supra in notes 1-2.

[FN70]. Just having a different professor for rights of publicity than for other courses may be sufficient, since one professor may have a different perspective on intellectual property from another professor.

[FN71]. White, 971 F.2d 1395.

[FN72]. See supra note 69.

[FN73]. White invoked both statutory and common-law rights under California law. White, 971 F.2d at 1396. Only the latter was held to be applicable, because of the narrower scope of the statute. Id. at 1397, 1399.

[FN74]. The salient feature pointing to Vanna White was the Wheel of Fortune set, the copyright to which is not owned by Vanna White. If the copyright owner licenses the use, should White's right of publicity nevertheless trump the license, which derives from the federal copyright statute? See White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1517-18 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc); see also Wendt v. Host Int'l, Inc., 35 U.S.P.Q. 2d at 1315-16 (9th Cir. 1995) (action for licensed use of robots based on television characters was not preempted by copyright law), on appeal after remand, 125 F.3d 806 (9th Cir. 1997), reh'g denied, 197 F.3d 1284 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc).

[FN75]. This might focus on the similarity between rights of publicity and protection against copying--protection without having to demonstrate likelihood of confusion, a general trademark requirement--which is part of the bundle of rights given to a copyright owner. See 17 U.S.C. §106(1) (2000).

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[FN76]. See David S. Welkowitz, Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits Of Celebrity Rights, 3 J. Intell. Prop. L. 67, 95-100 (1995), and David S. Welkowitz & Tyler T. Ochoa, The Terminator As Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech, 45 Santa Clara L. Rev. 651, 652-62 (2005), for discussions of this issue.

[FN77]. See, for example, Winter v. DC Comics, 69 P.3d 473, 30 Cal. 4th 881, 134 Cal. Rptr. 2d 634 (Cal. 2003), and Eastwood v. Super. Ct.of L.A. County, 198 Cal. Rptr. 342, 149 Cal. App. 3d 409 (Cal. Ct. App. 1983), both of which were decided under California law (and both of which rejected the right of publicity claim on First Amendment grounds), and Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003), decided under Missouri law, which rejected a First Amendment defense despite evidence that the plaintiff was suing primarily because he objected to being depicted in a comic book as a Mafia goon. See also Welkowitz & Ochoa, supra note 76, at 656-57. Professors Welkowitz and Ochoa authored an amicus brief in Winter in support of the defendants. Brief of Amici Curiae in Support of Defendant DC Comics, et al., Winter v. DC Comics, 69 P.3d 473, 30 Cal. 4th 881, 134 Cal. Rptr. 2d 634 (Cal. 2003) (No. S108751).

[FN78]. Indeed, it is not just First Amendment law that is relevant. Students who have taken constitutional law will be interested to learn that the first court to recognize a right of privacy grounded its ruling in substantive due process. See Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 71, 122 Ga. 190, 197 (Ga. 1905) (“The right of privacy ... [is] guarantied [sic] to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law.”).

[FN79]. See e.g., Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147 (1998); Welkowitz & Ochoa, supra note 76, at 662-70; Zimmerman, supra note 50, at 292-94.

[FN80]. See, e.g., Mark A. Lemley, The Constitutionalization of Technology Law, 15 Berkeley Tech. L.J. 529 (2000); Mark P. McKenna, The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property, 21 Wash. U. J.L. & Pol'y 11 (2006).

[FN81]. See, e.g., Margreth Barrett, Domain Names, Trademarks and the First Amendment: Searching for Meaningful Boundaries, 39 Conn. L. Rev. 973 (2007); Pratheepan Gulasekaram, Policing the Border Between Trademarks and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works, 80 Wash. L. Rev. 887 (2005); Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 Stan. L. Rev. 1 (2001); Lisa P. Ramsey, Descriptive Trademarks and the First Amendment, 70 Tenn. L. Rev. 1095 (2003); Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1 (2002). But see David McGowan, Some Realism About the Free-Speech Critique of Copyright, 74 Fordham L. Rev. 435 (2005).

[FN82]. See supra notes 43-49 and accompanying text.
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