

NOTES

A NEW APPROACH TO AN ENTERTAINER'S RIGHT OF PERFORMANCE

I. INTRODUCTION

The Copyright Act of 1976¹ protects authors' writings embodied in tangible form whether or not they are published.² The Act does not encompass performing artists' rights in unrecorded, live performances.³ Accordingly, performers must resort to state law for protection of aesthetic and commercial performance interests. Present state law, however, inadequately protects against unauthorized appropriation of live performances.

One major problem in obtaining state law protection of performances is the lack of a universally recognized definition of a protectible performance.⁴ Courts find that various elements compose a performance. The expression of the performer's style is the heart of a performance.⁵ The style may be the use of a certain characterization or the way one sings or acts. It may range from a concrete identification of a performer with certain dress or mannerisms⁶ to a more elusive situation in which there is no identification of the style with any type of character at all.⁷ The author must express the style in a performance because the

1. 17 U.S.C. §§ 101-810 (Supp. III 1979).

2. 17 U.S.C. § 301 (Supp. III 1979).

3. Creative works not fixed in any tangible medium of expression are not "writings" within the scope of the Act. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.08[C][2] (1981); see notes 25-52 *infra* and accompanying text.

4. See notes 6-11 *infra* and accompanying text.

5. "The individual performance . . . is the expression of the style/idea. It is that performance which is the property to which legal rights must attach to protect the performing artist, not the style of delivery." Lang, *Performance and the Right of the Performing Artist*, 21 ASCAP COPYRIGHT L. SYMP. 69, 95 (1974). See also *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Holmes v. Hurst*, 174 U.S. 82, 86 (1899); *Welles v. CBS*, 308 F.2d 810, 814 (9th Cir. 1962); 1 M. NIMMER, *supra* note 3, § 1.01[B][2][C]; Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1507 (1979).

6. See, e.g., *Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310, slip op. at 4 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1346 (D.N.J. 1981); *Chaplin v. Amador*, 93 Cal. App. 358, 362, 269 P. 544, 545 (1928).

7. Note, *Intellectual Property—Performer's Style—A Quest for Ascertainment, Recognition, and Protection*, 52 DEN. L.J. 561, 566-68 (1975). See, e.g., *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962).

style or character as an idea⁸ is not protectible against imitation alone.⁹ Thus, the performance is the particular rendition of a song or character that expresses the performer's style.¹⁰ The Copyright Act of 1976 does not protect this performance unless it is fixed in a tangible form such as on recordings or films.¹¹

Given such a generalized definition of performance, the adequacy of state law is best examined in light of the performance interests the per-

8. Lang, *supra* note 5, at 72-73; Raskin, *Copyright Protection for Fictional Characters*, 2 PERFORMING ARTS REV. 587, 590 (1971). See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). Cf. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (copyright protection of playwright's property not extended to ideas).

In the analogous area of the copyrightability of fictional characters, courts distinguish between the cartoon character and the literary character. Cartoon characters are protectible under copyright as a part of the work in which they appear. A. LATMAN, *THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT* 39 (1979); Brylawski, *Protection of Characters—Sam Spade Revisited*, 22 COPYRIGHT BULL. 77, 84 (1974). See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940); *Fleischer v. Freundlich*, 73 F.2d 276 (2d Cir. 1934); *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir. 1924); *Detective Comics, Inc. v. Fox Publications, Inc.*, 46 F. Supp. 872 (S.D.N.Y. 1942). Literary characters, on the other hand, are not normally copyrightable because they may exist independent of the particular work in which they are expressed. Comment, *Characters and the Copyright Clause—Is a Character a Writing?*, 26 BAYLOR L. REV. 222, 228 (1974). But cf. *CBS v. DeCosta*, 377 F.2d 315 (1st Cir. 1967) (although character of "Palladin" copyrightable, though not expressed in any particular work, copyright protection denied because character not registered), *cert. denied*, 389 U.S. 1007 (1967). See also note 150 *infra*. The author's rights in the character are protected by common law. Brylawski, *supra*, at 84-87. Thus, the author may use characters in subsequent work. *Warner Bros. Pictures, Inc. v. CBS, Inc.*, 216 F.2d 945 (9th Cir. 1954).

9. See *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 716 (9th Cir. 1970); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973); *Davis v. TWA*, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969); Lang, *supra* note 5, at 93.

Furthermore, protection of a specific style may hinder another performer's ability to use the popular style to gain his own recognition. Liebig, *Style and Performance*, 17 COPYRIGHT BULL. 40, 46 (1969). But see *Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

10. See, e.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970); *Booth v. Colgate-Palmolive Co.*, 352 F. Supp. 343 (S.D.N.Y. 1973); *Davis v. TWA*, 297 F. Supp. 1145 (C.D. Cal. 1969); *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937).

11. "A work is not 'fixed' under the Copyright Act unless its embodiment in tangible form is 'sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.'" 1 M. NIMMER, *supra* note 3, § 2.03 [B][2] (quoting 17 U.S.C. § 101 (Supp. III 1979) (Copyright Act of 1976)). See notes 25-33 & 36-41 *infra* and accompanying text.

Prior to 1972, copyright laws did not protect phonograph records from piracy. However, the passage of Pub. L. 92-140, 85 Stat. 391 (1971) protected recordings copyrighted after that year. The Supreme Court upheld state statutes protecting records and tapes from piracy if made before 1972 in *Goldstein v. California*, 412 U.S. 546 (1973). The 1976 Copyright Act further elaborated

former desires to protect. A performer has both intangible and commercial interests in his performance. The performer's basic intangible interest is reputation.¹² Reputation is attained by developing, through expenditures of time, skill, and money, a style, unique rendition, or character to which the public gives special recognition. Courts are unwilling, however, to protect creators' interests in their reputations alone—their "moral rights."¹³ This unwillingness is not fatal, however, because the performer's reputation interest largely depends on the marketability of his performances. The result is a merger of the intangible and commercial interests. Effective protection of commercial interests will correspondingly enhance intangible interests.

A performer's success depends upon his ability to exploit commer-

the protection afforded. *See generally* Note, *Performers' Rights Under the General Revision of the Copyright Law*, 28 CASE W. RES. L. REV. 766 (1978).

Protection of expression under the Copyright Act is also subject to the fair use doctrine. "Fair use is the privilege accorded others to use the copyrighted material in a reasonable manner without the proprietor's consent." Note, *supra* note 7, at 74. The fair use defense is regularly claimed in cases of parody, satire, and mimicry. These latter art forms use the copyrighted work to develop original works. *See, e.g.*, *Elsmere Music, Inc. v. NBC*, 623 F.2d 252 (2d Cir. 1980); *Green v. Minzensheimer*, 177 F. 286 (S.D.N.Y. 1905); *Bloom & Hamlin v. Nixon*, 125 F. 977 (E.D. Pa. 1903). *See generally* Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43 (1955); Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979); Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962); Wyckoff, *Defenses Peculiar to Actions Based on Infringement of Musical Copyrights*, 5 ASCAP COPYRIGHT L. SYMP. 256 (1954).

For an exhaustive discussion of fair use under the Copyright Act of 1976, see Seltzer, *Exemptions and Fair Use in Copyright: The Exclusive Rights Tension in the New Copyright Act*, 24 COPYRIGHT BULL. 215 (1977).

12. Once an artistic reputation is developed, the performer may exploit it through commercial endorsements and guest appearances. *See* notes 98-101 *infra* and accompanying text. *See generally* Note, *supra* note 5. *See also* Note, *An Artist's Personal Rights in his Creative Works: Beyond the Human Cannonball & the Flying Circus*, 9 PAC. L.J. 855 (1979).

13. The "moral right" is the right of an author to "claim recognition of his work, the right to prevent false attribution of his name to another's work, and the right to prevent objectionable alterations of his work." Note, *supra* note 5, at 1492.

This "moral right" is recognized in the civil law and under the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, Art. 6, *reprinted in* A. LATMAN, *supra* note 8, at 486. It is a right that an author receives in addition to copyright protection. An author's "moral right" is not recognized in the United States. Note, *The Question of Berne Entry for the United States*, 11 CASE W. RES. J. INT'L L. 421, 428 (1979). *See Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976).

The "moral right" protection is analogous to the protection performers seek for their interests in their reputation. It is a protection of personality and satisfies an author's desire to safeguard the goodwill his name connotes. *See generally* Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244 (1978); Treece, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMP. L. 487 (1968); Note, *supra* note 12.

cially his artistic reputation.¹⁴ Upon creation of an original concept, the performer is rightfully entitled to any commercial value gained from his endeavors.¹⁵ The performer thus has several reasons to prevent the unauthorized reproduction of his performance.¹⁶ First, an unauthorized use deprives him of control over the quality of the reproduction necessary to ensure an accurate portrayal of his capabilities.¹⁷ Second, the use may reduce his power to attract audiences because the appropriator may compete at a lower cost.¹⁸ Third, the performer desires to share in the royalties gained from sales of his performances.¹⁹ Finally, the performer wants control over the use of his performances,²⁰ that is, the ability to choose who uses his creative product.²¹

Contract law, although permitting the entertainer to place some limitations upon the use of his work,²² is inadequate as the sole avenue for protection. The performer can get relief only against those who are parties to the contract or with whom he is in privity. It provides no

14. A person is entitled to "reap the fruits of his labor." See, e.g., *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 802, 101 N.Y.S.2d 483, 497 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 442, 194 A. 631, 640 (1937). See note 12 *supra* and accompanying text.

15. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977); *Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310, slip op. at 5-6 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1360 (D.N.J. 1981).

16. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

17. See, e.g., *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

18. Traicoff, *Rights of the Performing Artist in His Interpretation and Performance*, 11 AIR L. REV. 225, 241 (1940).

19. *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1350 (D.N.J. 1981). See note 16 *supra*. See also *Miller v. Universal Pictures Co.*, 18 Misc. 2d 626, 188 N.Y.S.2d 386 (Sup. Ct. 1959), *rev'd and remanded*, 11 A.D.2d 47, 201 N.Y.S.2d 632 (1960), *reversal aff'd per curiam*, 10 N.Y.2d 972, 180 N.E.2d 248, 224 N.Y.S.2d 662 (1961).

20. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977).

21. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937). See Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1188-90 (1978).

22. See *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); Liebig, *supra* note 9, at 42; Comment, *The Twilight Zone: Meanderings in the Area of Performers' Rights*, 9 U.C.L.A. L. REV. 819 (1962).

protection from improper use by the general public.²³ Thus, the burden of providing greater protection is left to other substantive-state law theories.

This Note discusses the unavailability of federal copyright protection for performances. It then explores the elements of various state actions through the use of common fact patterns.²⁴ Finally, this Note analyzes the effectiveness of these state actions in safeguarding performance rights and proposes a model code that would adequately protect performers' interests.

II. FEDERAL COPYRIGHT PROTECTION

A. *Live Performance Copyright Protection*

Live performances are copyrightable if they come within the subject matter definition in section 102 of the 1976 Act.²⁵ Copyright protection attaches only to original works of authorship²⁶ fixed in a tangible

23. Comment, *supra* note 22, at 819.

24. Because of the difficulty of defining a performance, an examination of four common fact patterns involving performers is the best method for bringing into sharp focus the inadequacy of current legal protection for performances. In each scenario the entertainer develops a creative product that another person uses without the entertainer's authorization. Although the situations vary slightly, each is illustrative of common problems entertainers face in protecting their performance rights. Each example also presupposes that no express contract exists between the performer and the appropriator and that the performances are live and unrecorded.

25. The subject matter provision of the 1976 Act states, in pertinent part:

(a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea

17 U.S.C. § 102 (Supp. III 1979).

26. The legislative history indicates that

[t]he phrase "original works of authorship," which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.

H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 51 (1976) [hereinafter cited as HOUSE REPORT]. Thus, the copyright "originality" concept differs from the "novelty" standard applied in the patent

form.²⁷ Unrecorded live performances do not satisfy the fixation requirement and are, therefore, not protected under the Act. The stringent fixation requirement for live performances severely limits the availability of federal copyright protection for most performers.

There is one situation, however, in which live performances satisfy the subject matter requirement. If a live performance is simultaneously recorded and transmitted over the airwaves, federal copyright protection adheres to the recording.²⁸ The recording satisfies the fixation requirement. The work as fixed in a tangible form is perceivable either directly or with the aid of a mechanical device.

B. *Copyright Preemption Concerns*

Resolution of the threshold subject matter inquiry is also necessary to determine whether state law remedies are preempted.²⁹ Section 301 of the 1976 Act delineates the scope of federal copyright preemption.³⁰

context. *See* Lee v. Runge, 404 U.S. 887 (1971) (Douglas, J., dissenting), *denying cert. to* 441 F.2d 579 (9th Cir. 1971); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Any distinguishable variation, even an unintentional one, supports a copyright if the author independently creates the work. Courts will not weigh artistic merit. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). *But cf.* Amsterdam v. Triangle Publications, Inc., 189 F.2d 104, 106 (3d Cir. 1951) ("in order for a map to be copyrightable its preparation must involve a modicum of creative work"). *See also* 3 M. NIMMER, *supra* note 3, § 10.2.

27. 17 U.S.C. § 101 (Supp. III 1979). Fixation in a tangible form is a basic condition of copyright protection. Thus, copyright protection is given to television and radio programs that are videotaped or recorded simultaneously with their transmission. 1 M. NIMMER, *supra* note 3, § 1.08[C][2]. Improvisations, unrecorded performances, choreographic works, and broadcasts are not protected. HOUSE REPORT, *supra* note 26, at 83-86. The protection is given to the tangible form itself, but not to the underlying performance.

28. The legislative history of the Act states:

The further question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on a videotape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same; the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast.

HOUSE REPORT, *supra* note 26, at 52.

29. "[T]he concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection." *Id.*

30. 17 U.S.C. § 301 (Supp. III 1979).

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created

Any state law that protects the same subject matter and creates rights additional or equivalent to the exclusive rights in the Act is circumscribed.³¹ Thus, courts employ a two-tiered preemption analysis.³²

The subject matter prong is determined by reference to Section 102.³³ Although section 102 is not an exclusive list of copyright matter, its flexibility is designed to accommodate technical innovation.³⁴ Following a determination that the work is within the subject matter of copyright and is fixed in a tangible medium of expression, the courts then examine whether the rights the performer seeks to vindicate qualify for copyright protection.³⁵ As previously indicated, the Act does not cover

before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common-law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common-law or statutes of any State with respect to—

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

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

Id.

31. The intention of Section 301, which is the Federal preemption section is to preempt and abolish any rights under the common law or the statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law.

122 CONG. REC. 31982 (1976) (remarks of Rep. Hutchinson). *Accord*, HOUSE REPORT, *supra* note 26, at 130. *See* Diamond, *Preemption of State Law*, 25 COPYRIGHT BULL. 204, 207 (1977).

32. 17 U.S.C. § 301(a)-(b) (Supp. III 1979); Mentlik, *Federal Preemption in the Field of Intellectual Creations—An End to the Common Law Copyright*, 23 ASCAP COPYRIGHT L. SYMP. 115, 130 (1977).

33. *See* note 25 *supra* and accompanying text.

34. Mentlik, *supra* note 32, at 131-32.

35. 17 U.S.C. § 301(a) (Supp. III 1979). The equivalent rights analysis applies only to copyrightable works. *Id.* § 301(b)(1) (Supp. III 1979); H.R. CON. REP. 1733, 94th Cong., 2d Sess. (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5810, 5819 [hereinafter cited as CONFERENCE REPORT].

“The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been.” HOUSE REPORT, *supra* note 26, at 131.

The exclusive rights in copyrighted works are enunciated in § 106:

[T]he owner of copyright . . . has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

live, unrecorded performances.³⁶ Therefore, the equivalent rights prong is irrelevant in that context. Both section 301(b)(1) and the Act's legislative history recognize this exemption from federal preemption.³⁷ State remedies purporting to protect simultaneously recorded and transmitted performances, however, are preempted if equivalent rights are provided.³⁸

There is also constitutional support for the proposition that the 1976 Act does not preempt state law protection of live performances. Constitutional limitations prevent Congress from legislating with regard to works not encompassed within the Copyright Clause.³⁹ The Clause only protects "writings."⁴⁰ A live performance is not a "writing" because it is not fixed in a tangible form.⁴¹ Thus, Congress' power to legislate with regard to these works is limited.⁴² The express language of section 301(b)(3)⁴³ of the Act and the accompanying legislative history recognize this constitutional limitation.⁴⁴

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (Supp. III 1979).

36. See notes 25-28 *supra* and accompanying text.

37. [U]nfixed works are not included in the specified "subject matter of copyright." They are therefore not affected by the preemption of section 301, and would continue to be subject to protection under state statute or common law until fixed in a tangible form.

. . . .
 . . . [S]ection 301(b) explicitly preserves common law copyright protection for one important class of works: works that have not been "fixed in any tangible medium of expression." Examples would include choreography that has never been filmed or notated, an extemporaneous speech, "original works of authorship" communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down.

HOUSE REPORT, *supra* note 26, at 131. See note 30 *supra* for the text of § 301.

38. For a fuller discussion of the controversy surrounding the "equivalent rights" prong, see HOUSE REPORT, *supra* note 26, at 131-32; CONFERENCE REPORT, *supra* note 35, at 78; 122 CONG. REC. 31982 (1976) (Remarks of Reps. Hutchinson, Sieberling, and Railsback). See also Fetter, *Copyright Revision and the Preemption of State Misappropriation Law: A Study in Judicial and Congressional Interaction*, 25 COPYRIGHT BULL. 367 (1978).

39. 1 M. NIMMER, *supra* note 3, at § 1.01[B][1][a].

40. U.S. CONST. art. 1, § 8, cl. 8.

41. 1 M. NIMMER, *supra* note 3, § 1.01[B][1][a].

42. *Id.* Nimmer comments that "[i]f Congress lacks the power to legislate with respect to such works, it also lacks the power to preempt such state legislation." *Id.* § 1.01[B][2][a] at 1-22.

43. 17 U.S.C. § 301(b)(1) (Supp. III 1979). See note 31 *supra* and accompanying text.

44. In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the

Even prior to the enactment of the 1976 Act the Supreme Court held that the Copyright Act of 1909 was not exclusive.⁴⁵ States could legislate with regard to works beyond the scope of the 1909 Act. Early Supreme Court decisions precluded state unfair competition laws that protected works omitted from the federal laws and deemed the federal copyright and patent laws exclusive.⁴⁶ In 1973, however, the Court in *Goldstein v. California*⁴⁷ concluded that the federal copyright law did not preempt a California antipiracy statute for tapes and records.⁴⁸ *Goldstein* held that Congress' power under the Copyright Clause was not exclusive and that states could protect those areas the federal copyright act left unattended.⁴⁹

In 1977 the Court in *Zacchini v. Scripps-Howard Broadcasting Co.*⁵⁰ recognized the existence of concurrent state protection for works not within the constitutional scope of copyright. *Zacchini* recognized the right of a performer to assert a common-law right of publicity to redress an appropriation of his entire performance by the television news media.⁵¹ Although the Court did not discuss the question whether

principal areas of protection that preempting would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, that preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal copyright statute.

HOUSE REPORT, *supra* note 26, at 131.

45. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 357 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

46. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 357 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

[W]hen an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.

376 U.S. at 237.

47. 412 U.S. 546 (1973).

48. *Id.* at 571.

49. [T]he language of the Constitution neither explicitly precludes the States from granting copyrights nor grants such authority exclusively to the Federal Government. . . . No reason exists why Congress must take affirmative action either to authorize protection of all categories of writings or to free them from all restraint. We therefore conclude that, under the Constitution, the states have not relinquished all power to grant to authors "the exclusive Right to their respective Writings."

Id. at 560. *Accord*, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478-79 (1974). *Cf.* *Mercury Record Prods., Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705 (1974) (extension of right to common law as well as state statutory protection).

50. 433 U.S. 562 (1977).

51. *Id.* at 577.

Zacchini could copyright his act, it recognized the ability of a state to protect live, unrecorded performances.⁵² In both *Goldstein* and *Zacchini*, the Court declined to consider the subject matter within the patent or copyright laws.⁵³

III. STATE LAW PROTECTION

Entertainers may protect their interests in live, unrecorded performances under various state laws. The following discussion examines the elements of four state causes of action upon which performers must often rely: common-law copyright,⁵⁴ right of publicity,⁵⁵ passing off,⁵⁶ and misappropriation.⁵⁷ The effectiveness of these substantive theories in protecting performers' interests is illustrated by common fact patterns.⁵⁸

A. *Common-Law Copyright: The Nightclub Performer*

The nightclub performer, after years of struggling, creates a successful act combining improvisation and impersonation. Another performer sees the act, notes the tremendous public approval of it, and takes the act as his own without the creating entertainer's consent. Consequently, the creator loses much of his audience appeal because of this taking and seeks redress from the appropriator.

The nightclub performer may use the common-law copyright theory to recover for the unconsented use of his creation. Because the 1976 Act preempts only common-law copyright for works within the scope of the Act,⁵⁹ unfixed creations are not affected.⁶⁰

Prior to the passage of the 1976 Act a dual system of copyright protection existed.⁶¹ Before publication of a writing an author had a common-law copyright interest in his work. This common-law copyright

52. *Id.*

53. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (recovery allowed on misappropriation rather than copyright theory); *Goldstein v. California*, 412 U.S. 546 (1973) (sound recordings not within the subject matter of copyright under 1909 Act).

54. See notes 59-77 *infra* and accompanying text.

55. See notes 78-122 *infra* and accompanying text.

56. See notes 123-46 *infra* and accompanying text.

57. See notes 147-70 *infra* and accompanying text.

58. Although only one fact pattern will be used to explore each area of state law, these legal theories are not mutually exclusive and may be combined in any cause of action.

59. See notes 25-27 & 29-38 *supra* and accompanying text.

60. See notes 27-28 *supra* and accompanying text.

61. 1 M. NIMMER, *supra* note 3, § 1.01[A].

entitled him to relief against any unconsented appropriation of his work.⁶² Upon publication, the author either obtained a federal copyright⁶³ or permitted dedication of his work into the public domain. The 1976 Act eliminates this dichotomy and protects both published and unpublished writings.⁶⁴ Because a live, unrecorded performance is not a writing,⁶⁵ the 1976 Act does not bar state relief for the nightclub performer's claim.

Although the performer's claim is theoretically valid, there is insufficient case law interpreting the post-1976 viability of the cause of action to define clearly the requisite elements. Regardless of this ambiguity, the performer must show a property interest in the performance.⁶⁶ This interest is established when the performer develops an original creation.⁶⁷ Moreover, although the creation is unfixated, the performer must express it concretely.⁶⁸ This property status enables the performer to control the use of the performance through contract.⁶⁹ The performer's interest also prevents unauthorized uses of the performance.⁷⁰ When a performer engages in a live act in front of a limited audience, an implied contract exists between them. The performer controls the audience's use of his performance by prohibiting audio and video recording

62. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Classic Film Museum, Inc. v. Warner Bros., Inc.*, 453 F. Supp. 852, 854 n.1 (D. Me. 1978). See generally Comment, *supra* note 22, at 820-40; Note, "Copyright" Protection For Uncopyrightables: The Common-Law Doctrines, 108 U. PA. L. REV. 699, 702-09 (1960).

63. If an author did not register his copyrightable work then he lost all rights to it. Furthermore, to qualify for federal copyright protection the work had to be original and in a tangible form. Copyright Act, ch. 320, 35 Stat. 1075 (1909) (current version at 17 U.S.C. §§ 101-810 (Supp. III 1979)). See *Burke v. NBC*, 598 F.2d 688, 691 (1st Cir. 1979).

64. 17 U.S.C. § 301 (1978).

Federal copyright protection is therefore given to all works, published or unpublished. To sue for infringement of the copyright the work must be registered, but the cause of action may arise while the work is unpublished. See 17 U.S.C. §§ 408-412 (Supp. III 1979).

65. See notes 40-41 *supra* and accompanying text.

66. See, e.g., *Waring v. Dunlea*, 26 F. Supp. 338, 340 (E.D.N.C. 1939); *KGB, Inc. v. Gianoulas*, 104 Cal. App. 3d 844, 854, 164 Cal. Rptr. 571, 581 (1980); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 802, 101 N.Y.S.2d 483, 497 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

67. The performance must only be original; it is not necessary that it be novel or unique. Comment, *supra* note 22, at 823-24.

68. 1 M. NIMMER, *supra* note 3, § 2.02.

69. *Ettore v. Philco Television Broadcasting Corp.*, 299 F.2d 481, 487 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

70. See *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 799, 101 N.Y.S.2d 483, 495 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 440, 194 A. 631, 638 (1937).

devices in the theater. Any unauthorized taking of the creation violates the performer's property right in his work.⁷¹

The 1976 Act eliminated the need to determine whether a creator published a writing before granting protection.⁷² For works that are not writings in the constitutional sense, however, courts still must determine the matter of dedication to public use before state law protection adheres. At least one state has codified the doctrine that protection is never given to published works.⁷³ In such instances the statute requires intentional publication.⁷⁴ Mere performance before an audience is not always sufficient intention,⁷⁵ especially in circumstances in which the creator gains his livelihood by performing.⁷⁶ Thus, under common-law copyright the nightclub performer may recover for the unauthorized appropriation upon showing that the performance is his property and that he has not intentionally dedicated it to public use. He need not comply with any formality associated with statutory copyright.⁷⁷

B. *The Right of Publicity: The Marketability of a Reputation*

A famous actor develops a public reputation because of his successful performances. The actor, or his heirs, desires to capitalize on this success. He finds that his reputation, as expressed in his name, likeness, or personality, is a marketable commodity. An advertiser, recognizing the commercial value of the actor's reputation, uses the actor's name, likeness, or personality to

71. 1 M. NIMMER, *supra* note 3, § 1.03[A].

72. 17 U.S.C. § 301 (Supp. III 1979).

73. CAL. CIV. CODE § 983(a) (Deering 1971).

74. *Burke v. NBC*, 598 F.2d 688, 691 (1st Cir. 1979).

75. The United States Supreme Court, in *Ferris v. Frohman*, 223 U.S. 424, 435 (1911), held that "[a]t common-law, the public performance of [a] play is not an abandonment of it to public use." See *Burke v. NBC*, 598 F.2d 688 (1st Cir. 1979) (granting one person's request to use film for television not publication allowing another company to use film); *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955) (sale of records to public not dedication to the public); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963) (speech before crowd not publication); *Lennon v. Pulsebeat News, Inc.*, [1964] 143 U.S.P.Q. (BNA) 309 (N.Y. Sup. Ct.) (public interviews not publication or abandonment of ownership); *CBS v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964) (rendering of performance before microphone not an abandonment of ownership or dedication to the public).

76. [I]t would be absurd to consider performance publication with regard to the performer while at the same time recognizing in him a property right in his performance. This would mean that the very act essential to creation would at the same time operate to destroy the right. It would follow that the performer retains his property right in the live ephemeral performance.

Comment, *supra* note 22, at 826.

77. 1 M. NIMMER, *supra* note 3, § 2.02.

sell a product. The actor, finding that this irreparably damages the marketability of his reputation, desires compensation for this unauthorized use of his name, likeness, or personality.

The actor may use the evolving right of publicity to recover for the unauthorized use of his name, likeness, personality, or performance. The right of publicity is an independent tort doctrine protecting an individual's pecuniary interest in these characteristics.⁷⁸ The doctrine recognizes that persons should profit from publicity values they create or acquire.⁷⁹ The right of publicity promotes the state's interest in encouraging creativity in the entertainment field.⁸⁰

The right of publicity developed because the right of privacy inadequately protects a person's commercial interests in his name, likeness, and personality.⁸¹ The right of privacy is a negative right.⁸² It com-

78. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Price v. Worldvision Enterprises, Inc.*, 455 F. Supp. 252 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 288 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Memphis Dev. Foundation v. Factors Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977), *rev'd on other grounds*, 616 F.2d 956 (6th Cir. 1980); *Price v. Hal Roach Studios*, 400 F. Supp. 836 (S.D.N.Y. 1975); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963); *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967); *Miller v. Universal Pictures Co.*, 10 N.Y.2d 972, 180 N.E.2d 298, 224 N.Y.S.2d 662 (1961); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977); *Hogan v. A.S. Barnes & Co.*, [1957] 114 U.S.P.Q. (BNA) 314 (Pa. C.P.). *But see* *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). See generally *Fletcher & Rubin, Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979); *Nimmer, The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954); *Treece, Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637 (1973); Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527 (1976) [hereinafter cited as *Right of Publicity*]; Note, *Performer's Right of Publicity: A Limitation on News Privilege*, 26 CLEV. ST. L. REV. 587 (1977) [hereinafter cited as *Performer's Right of Publicity*].

The pecuniary value of the entertainer's name, likeness, personality, and performance is acquired through the investment of time, effort, and money.

79. One commentator defines it as "the right of each person to control and profit from the publicity values which he has created or purchased." *Nimmer, supra* note 78, at 216.

80. The right of publicity promotes "the creation of entertainment, much as the copyright and patent laws encourage other types of creativity." Note, *Performer's Right of Publicity, supra* note 78, at 598.

81. The right of privacy is the right of an individual "to be let alone"—free from unwarranted intrusions into his private life. See E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY

pensates for injury to feelings or emotional distress⁸³ resulting from "commercial appropriation of elements of personality."⁸⁴ The right of privacy is a personal right that is neither assignable nor descendible.⁸⁵ Damages are awarded only for a highly offensive intrusion into a person's life.⁸⁶ Moreover, the right of privacy contains a waiver doctrine

LAW PRIMER 447 (1975); Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U.L. REV. 553, 554 (1960); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); Note, *Right of Publicity*, *supra* note 78, at 528; Note, *Performer's Right of Publicity*, *supra* note 78, at 595; Note, *supra* note 7, at 588. See, e.g., *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 52 S.E. 68 (1905). See generally Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Yankowich, *The Right of Privacy*, 27 NOTRE DAME LAW. 499 (1952).

Dean Prosser divided the right of privacy into four separate causes of action: (1) unreasonable invasion of another's seclusion; (2) unreasonable publicity given to the private life of another; (3) publicity that would unreasonably place another in a false light to the public; and (4) appropriation of another's name or likeness. Prosser, *supra*, at 389. Accord, RESTATEMENT (SECOND) OF TORTS § 652A (1977). The fourth cause of action has developed into the right of publicity. See E. KINTNER & J. LAHR, *supra*, at 453-55; Gordon, *supra*, at 570; Treese, *supra* note 78, at 637; Note, *Right of Publicity*, *supra* note 78, at 532; Note, *supra* note 62, at 718. See generally Comment, *supra* note 22. Compare *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) with *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

82. Pipel, *The Right of Publicity—The Tenth Donald C. Brace Memorial Lecture*, 27 COPYRIGHT BULL. 249, 252 (1980).

83. RESTATEMENT (SECOND) OF TORTS § 652H (1977):

One who has established a cause of action for invasion of his privacy is entitled to recover damages for

- (a) the harm to his interest in privacy resulting from the invasion;
- (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
- (c) special damage of which the invasion is a legal cause.

See, e.g., *Colgate-Palmolive Co. v. Tullos*, 219 F.2d 617 (1st Cir. 1955); *McCreery v. Miller's Groceries*, 99 Colo. 499, 64 P.2d 803 (1936).

84. *Chaplin v. NBC*, 15 F.R.D. 134, 139 (S.D.N.Y. 1953).

85. Only the person whose privacy is invaded may assert the right of privacy. *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 653, 344 P.2d 799, 801 (1959); E. KINTNER & J. LAHR, *supra* note 81, at 452; RESTATEMENT (SECOND) OF TORTS § 652I, Comment a (1977); Note, *Performer's Right of Publicity*, *supra* note 78, at 598. See also *Maritote v. Desilu Prods.*, 345 F.2d 418 (9th Cir. 1965); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

86. RESTATEMENT (SECOND) OF TORTS, §§ 652B, D & E (1977); Prosser, *supra* note 81, at 391.

The reasonableness of the intrusion upon privacy is a consideration in determining whether a tort has occurred. Courts have awarded damages under all four of the actions articulated by Prosser. See note 81 *supra*. See, e.g., *Motschenbacher v. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974); *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1971); *Miller v. NBC*, 157 F. Supp. 240 (D. Del. 1957); *Bernstein v. NBC*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir.), *cert. denied*, 352 U.S. 945 (1956); *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951); *Young v. Western & Atl. R.R.*, 39 Ga. App. 761, 148 S.E. 345 (1929); *Welsh v. Roehm*, 125 Mont. 517, 241 P.2d 816 (1952);

that bars public figures from recovering for unconsented appropriations of name, likeness, or personality.⁸⁷

The right of publicity, however, encourages the promotional use of the personality.⁸⁸ Performers intentionally publicize their activities and creations to promote the exploitation of the advertising values in their names, likenesses, and personalities. The right of publicity protects the performer's ability to decide how these publicity characteristics will be used. A performer may recover for any unauthorized use of the values, subject only to a limited number of restrictions.⁸⁹

The actor may recover for an advertiser's unauthorized use of his name, likeness, personality, or performance because he has a controllable property interest in these characteristics.⁹⁰ The actor creates this

Edison v. Edison-Polyform Mfg. Co., 73 N.J. Eq. 136, 67 A. 392 (Ch. 1907); Rosemont Enterprises, Inc. v. Urban Sys., Inc., 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct.), *aff'd as modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973); Meyers v. U.S. Camera Pub. Corp., 9 Misc. 2d 765, 167 N.Y.S.2d 771 (Civ. Ct. 1957); Hogan v. A.S. Barnes & Co., [1957] 114 U.S.P.Q. (BNA) 314 (Pa. C.P.).

Courts, however, have limited remedies for the fourth category to nominal damages. *See, e.g.*, Chaplin v. NBC, 15 F.R.D. 134 (S.D.N.Y. 1953); Cepeda v. Swift & Co., 291 F. Supp. 242 (E.D. Mo. 1968), *aff'd*, 415 F.2d 1205 (8th Cir. 1969); Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. Pa. 1963); Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 232 A.2d 458 (1967); Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968).

87. Under the right of privacy an individual, such as a performer, waives his privacy right when he places himself in the public light. E. KINTNER & J. LAHR, *supra* note 81, at 453; Prosser, *supra* note 81, at 410-14. *See, e.g.*, O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942); Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004 (W.D. Okla. 1938), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952); Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (C.P. 1938).

Waiver may be limited, however, to public activity so that the more intimate details of a performer's life retain privacy protection. RESTATEMENT (SECOND) OF TORTS § 652D (1977); Prosser, *supra* note 81, at 415-19.

88. E. KINTNER & J. LAHR, *supra* note 81, at 459; Nimmer, *supra* note 78, at 204; Pipel, *supra* note 82, at 252.

89. *See* notes 106-15 *infra* and accompanying text.

90. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Memphis Dev. Foundation v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980); Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942); Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978); Price v. Worldvision Enterprises, Inc., 455 F. Supp. 252 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279 (S.D.N.Y. 1977); Memphis Dev. Foundation v. Factors Etc., Inc., 441 F. Supp. 1323 (W.D. Tenn. 1977), *rev'd on other grounds*, 616 F.2d 956 (6th Cir. 1980); Price v. Hal Roach Studios, 400 F. Supp. 836 (S.D.N.Y. 1975); Uhlaender v. Henricksen, 316 F. Supp. 1277

property interest through successful performances. As a result of this property status, contract law performs an important role in protecting the performer's interests. The right of publicity is assignable and may be made the subject of an exclusive license.⁹¹ This aspect of the right enhances the actor's advertising value while decreasing the possibility of another's unauthorized, uncompensated appropriation of the actor's personality or performance.⁹²

Case law supports the actor's claim. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,⁹³ the first case to embrace the theory of the right of publicity, the Second Circuit held that a baseball player's exclusive contract with one chewing gum manufacturer for the use of his photograph precluded another chewing gum manufacturer from entering into a similar contract with the ballplayer.⁹⁴ The court distinguished the right of privacy from the right of publicity and noted that the publicity right is independent and is capable of assignment.⁹⁵ The court also recognized that the inability to make an exclusive grant of the right would render its monetary value worthless.

Another court, extending this holding, included within the theory's

(D. Minn. 1970); *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963); *Uproar Co. v. NBC*, 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir. 1935), *cert. denied*, 298 U.S. 670 (1936); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal Rptr. 323 (1979); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977); *Hogan v. A.S. Barnes & Co.*, [1957] 114 U.S.P.Q. (BNA) 314 (Pa. C.P.).

91. *Memphis Dev. Foundation v. Factors Etc., Inc.*, 616 F.2d 956, 957-58 (6th Cir. 1980); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Factors Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090, 1093 (S.D.N.Y. 1980); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 282 (S.D.N.Y. 1977); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970); E. KINTNER & J. LAHR, *supra* note 81, at 459; *Nimmer, supra* note 78, at 216.

92. Thus, if someone impermissibly appropriates a name, likeness, or personality that is the subject of an exclusive license, the appropriator is liable to the licensee for inducing a breach of contract. *See Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288 (S.D.N.Y. 1977); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Memphis Dev. Foundation v. Factors Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977), *rev'd on other grounds*, 616 F.2d 956 (6th Cir. 1980). *See* notes 99-105 *infra* and accompanying text.

93. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

94. *Id.* at 869.

95. [I]n addition to and independent of that right of privacy . . . , 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.

Id. at 868.

protection a performer's proprietary interest in his reputation.⁹⁶ The reputation in this context is adjunct to the property interest in the likeness because it is actually responsible for the marketable publicity value of the name, likeness, or personality. Under this theory, courts also grant relief for inducing the breach of an exclusive contract with a well-known personality or appropriating the name, likeness, photograph, or performance of a personality without permission.⁹⁷

The major importance of the actor's ability to assign his right of publicity lies in his capability to prevent an advertiser from using the actor's publicity characteristics to imply endorsement of the advertiser's product.⁹⁸ Audience appeal is created through the performances that make the celebrity famous,⁹⁹ but only at the expense of the privacy surrendered in becoming a public personality.¹⁰⁰ The performer's injury in advertising cases is, therefore, more than his present loss of compensation. Rather, the use injures his public reputation and "diminishes the future value of his endorsement."¹⁰¹ Moreover, this unauthorized use unjustly enriches the advertiser at the performer's expense.¹⁰²

96. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978).

97. *See, e.g., Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942); *Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963); *Uproar Co. v. NBC*, 8 F. Supp. 358 (D. Mass. 1934). *But see Republic Pictures Corp. v. Rogers*, 213 F.2d 662 (9th Cir. 1954); *Autry v. Republic Prods.*, 104 F. Supp. 918 (S.D. Cal. 1952).

98. "Financial success in the exploitation of a celebrity's name or portrait is attained only when the corporation or advertising agency possesses a right to the use of that name or portrait." E. KINTNER & J. LAHR, *supra* note 81, at 452-53.

99. As one commentator suggests, "[a]udience appeal is a principal stock-in-trade of a celebrity." *Treece, supra* note 78, at 64.

100. *Id.* The surrender of the privacy right entitles the entertainer to whatever financial benefits are gained from his performances.

101. *Id.*

In three kinds of cases the advertisement may . . . injure the future earning capacity of the celebrity: (1) when the advertised product or service is shoddy; (2) when the person pictured or named in the advertisement has already endorsed a like product; and (3) when a significant segment of the public knows that the person neither uses nor recommends the product. In each case, the advertising use of the name or picture suggests that the individual is irresponsible and willing to deceive the consuming public—suggestions that probably would diminish the future value of the celebrity's endorsement.

Id. at 642-45. *See, e.g., Carson v. National Bank of Commerce Trust & Sav.*, 501 F.2d 1082 (8th Cir. 1974); *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962).

102. *Treece, supra* note 78, at 646.

Unauthorized use of publicity characteristics constitutes an interference with future contracts. An advertiser appropriating an actor's personality characteristics without his consent may be liable to the actor for the commercial advertising value of the name, likeness, or personality.¹⁰³ To recover, the actor need only show an unconsented use. It is not necessary that the advertiser use the characteristics for "advertising purposes" or for "purposes of trade."¹⁰⁴ The difficulty of proving damages in nonadvertising cases, however, may operate either to limit recovery to actual loss suffered or force the actor to seek equitable relief.

During his lifetime, the actor will generally succeed in actions against the advertiser for unauthorized uses of his publicity characteristics.¹⁰⁵ Following his death, however, his heirs may find their efforts to recover thwarted. The descendibility of the right of publicity is not uniformly recognized.¹⁰⁶ District courts in the Second Circuit, interpreting New York law, hold that the right of publicity is descendible to the performer's heirs following the performer's lifetime exploitation.¹⁰⁷

103. Nimmer, *supra* note 78, at 216; Note, *Right of Publicity*, *supra* note 78, at 533; Note, *Performer's Right of Publicity*, *supra* note 78, at 601. See *Price v. Hal Roach Studios*, 400 F. Supp. 836, 847 (S.D.N.Y. 1975).

104. E. KINTNER & J. LAHR, *supra* note 81, at 449. A number of states have codified the right of privacy. See, e.g., CAL. CIV. CODE § 3344 (Deering 1972); MASS. GEN. LAWS ANN. ch. 214, § 3A (West Supp. 1976); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); OKLA. STAT. ANN. tit. 21, § 839.1-3 (West Supp. 1980); VA. CODE § 18.2-216.1 (Supp. 1980).

New York was the first state to codify the right of privacy, and its provision exemplifies such laws:

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

N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976). Courts strictly construe this statute: "[I]t is clear that the Civil Rights Law is to be strictly construed and is not to be applied so as to prohibit the portrayal of an individual's personality or style of performance." *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 622, 396 N.Y.S.2d 661, 664 (1977). *Accord*, *Namath v. Sports Illustrated*, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (Sup. Ct. 1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

105. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *Hirsch v. S.C. Johnson & Sons, Inc.*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

106. See notes 107-15 *infra* and accompanying text. See generally *Fletcher & Rubin*, *supra* note 78, at 1593-94; Note, *Right of Publicity*, *supra* note 78, at 541-49.

107. *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Price v. Worldvision Enterprises, Inc.*, 455 F. Supp. 252 (S.D.N.Y. 1978); *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288 (S.D.N.Y. 1977); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 282 (S.D.N.Y. 1977); *Price v. Hal Roach Studios*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975). *But cf.*

The lifetime exploitation requirement is a recent development.¹⁰⁸ In earlier decisions, this requirement is absent.¹⁰⁹ Second Circuit district courts have also granted heirs actual damages for unauthorized appropriations of deceased performer's characterizations.¹¹⁰

California courts, by contrast, deny relief to a celebrity's heirs for infringement of the right of publicity, regardless of the celebrity's lifetime exploitation of the right.¹¹¹ In *Lugosi v. Universal Pictures*,¹¹² the heirs of Bela Lugosi sought to recover the profits a motion picture company made through an allegedly unauthorized licensing of the character of Count Dracula. The California Supreme Court upheld a lower court ruling that denied the heirs' claim, reasoning that the ability to exploit one's name, likeness, or personality for commercial use is encompassed under the right of privacy, is personal to the artist, and is not descendible.¹¹³ Lugosi, therefore, could have exploited the right during his lifetime, but the right died with him.¹¹⁴ Thus, an actor's heirs will not recover in California because the right of publicity as an

Miller v. Universal Pictures Co., 10 N.Y.2d 972, 180 N.E.2d 298, 224 N.Y.S.2d 662 (1961) (no property right in bandleader's style or "sound," and therefore none could pass to his widow).

Although New York courts have not explicitly recognized the common law right of publicity, there has been no denial that such a right exists. See *Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310 (S.D.N.Y. Oct. 5, 1981); *Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 219 (1978); *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 828 (1980).

108. See generally Fletcher & Rubin, *supra* note 78; Comment, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980). See also note 109 *infra*.

The exploitation requirement demands only an overt recognition of the extrinsic commercial value of the name, likeness, personality, or performance. Association of the characteristics with an advertising product is unnecessary. See *Groucho Marx Prods., Inc. v. Day & Night Co., Inc.*, No. 80-2310, slip op. at 12-17 (S.D.N.Y. Oct. 5, 1981); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978).

109. See *Price v. Hal Roach Studios*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975).

110. *Price v. Worldvision Enterprises, Inc.*, 455 F. Supp. 252, 266 (S.D.N.Y. 1978); *Price v. Hal Roach Studios*, 400 F. Supp. 836, 847 (S.D.N.Y. 1975).

111. See, e.g., *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 869, 603 P.2d 454, 460, 160 Cal. Rptr. 352, 358 (1979); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 818, 603 P.2d 425, 428, 160 Cal. Rptr. 323, 326 (1979); *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 653, 344 P.2d 799, 801 (1959).

112. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

113. *Id.* at 822, 603 P.2d at 430, 160 Cal. Rptr. at 328.

114. *Id.* 824, 603 P.2d at 431, 160 Cal. Rptr. at 329. The California Supreme Court reached a similar result in a *Lugosi* companion case. See *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

independent tort doctrine is not recognized. California relies upon the right of privacy to provide the desired protection.

Although the actor desires recovery from an advertiser, in some cases he may also wish to recover for a nonadvertising use. In these situations first amendment limitations may impede recovery. The right of publicity does not extend to the use of names or likenesses in connection with fictionalized books or movies.¹¹⁵ The first amendment defense of newsworthiness may limit recovery for infringement of the right of publicity.¹¹⁶ Other first amendment rights also circumscribe the operation of the right of publicity.¹¹⁷

In *Zacchini v. Scripps-Howard Broadcasting Co.*¹¹⁸ the United States Supreme Court balanced these interests and held that a television station's appropriation of a performer's entire act for its news program was not within the scope of the first amendment privilege of freedom of press.¹¹⁹ The performer, a human cannonball, obtained relief for the appropriation based on his right to the publicity value of his performance.¹²⁰

115. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 867, 603 P.2d 454, 459, 160 Cal. Rptr. 352, 357 (1979) (Bird, C.J., concurring).

116. Because the right of publicity applies only to the use of a name, likeness, or personality for commercial or advertising purposes it cannot prevent the dissemination of news. The defense of newsworthiness is, however, subject to strict scrutiny. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973); *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967); *Spahn v. Julian Messner, Inc.*, 21 N.Y.S.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1968).

117. *See, e.g., Rosemont Enterprises, Inc. v. Irving*, 49 A.D.2d 445, 375 N.Y.S.2d 864 (1975); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969).

The defense of fair use may be claimed if the characteristics are used for purposes of parody, satire, or literary commentary because of the contributions these works make to the arts field. *Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310, slip op. at 19 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1356-61 (D.N.J. 1981). *See* note 11 *supra*.

In any case, the court must balance the first amendment claims against the appropriated publicity rights. The balancing test involves a determination of whether the use of the work is designed primarily to disseminate thoughts, ideas, or information or for commercial purposes. *See Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310, slip op. at 18 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1356 (D.N.J. 1981).

118. 433 U.S. 562 (1977).

119. "The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner . . ." *Id.* at 575.

120. *Id.* at 576.

The successful actor will also find that the right of publicity protects his underlying performance as well as personality characteristics.¹²¹ The actor's success in attracting audiences to his performances reflects the publicity value attached to his name, likeness, and personality. In *Zacchini*, the Court stated that "the appropriation of the very activity by which the entertainer acquired his reputation in the first place" is the strongest case for the right of publicity.¹²² Consequently, the actor who has had his name, likeness, personality, or performance appropriated will recover, in most instances, for violation of the right of publicity.

C. *Passing Off: Stealing a Character*

As part of his act, a performer creates a distinctive character. The public associates the character with the actor. An advertiser, desiring to benefit from the performer's success without compensating him, imitates the character in its commercials. As a result of the unauthorized and uncompensated imitation, the performer's reputation and income are diminished. He desires to halt the unauthorized use and recover the advertiser's illgotten gains.

The performer, to protect his actual performance, may use the unfair competition theory of "passing off." The essence of this tort is the intentional sale of the goods of one individual as those of another.¹²³ Although "passing off" originated in trademark infringement claims, courts have extended it by analogy to other areas of intellectual property.¹²⁴ The only drawback to the use of "passing off" in performance cases is the difficulty the performer may have in satisfying the requisite elements.¹²⁵

121. *Id.* See also *Groucho Marx Productions, Inc. v. Day & Night Co.*, No. 80-2310 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

122. 433 U.S. at 576.

123. *Wm. A. Roger, Ltd. v. Majestic Prods. Corp.*, 23 F.2d 219, 220 (D. Del. 1927); W. PROSER, *HANDBOOK OF THE LAW OF TORTS* § 130, at 957 (4th ed. 1971).

124. Federal trademark infringement claims are encompassed under the Lanham Act §§ 29-45, 15 U.S.C. §§ 1111-1127 (Supp. IV 1980). Courts have extended the principles established, however, to areas of commercial relationships in which the goods of one party are sold to the public as those of another. See, e.g., *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962); *Lone Ranger, Inc. v. Cox*, 124 F.2d 650 (4th Cir. 1942); *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904 (S.D. Cal. 1950); *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (1928). See generally R. CALLMAN, *UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* (3d ed. 1969); Leach & Feldman, *The Relationship Between Copyright and Unfair Competition Principles*, 10 AS-CAP COPYRIGHT L. SYMP. 266 (1959).

125. The performer creating the character may recover for the unauthorized use under "passing off" upon a showing that his character acquired a secondary meaning, the advertiser's imita-

The performer's success in recovering for an unauthorized use of his distinctive character will largely depend upon the degree of connection in the public mind between the performer and the actual performance.¹²⁶ This public connection creates the performer's protectible interest in the character. The protectible interest is the good will or secondary meaning that inures to the character as a result of the performer's investment of time, energy, and money in developing a market for his product.¹²⁷

Once a protectible interest is recognized, courts grant relief only upon a showing of an advertiser's deception as to the source of the product or performance.¹²⁸ Actual deception is not a strict requirement. The mere likelihood of confusion is sufficient for a violation.¹²⁹ Imitation of a product without more, however, is insufficient proof of the confusion necessary to support an action for "passing off."¹³⁰ Thus, the actor must show that the advertiser tried to deceive the public into believing the actor appeared in the commercial.

Performers' attempts to prevent others from uncompensated uses of imitations of their voices or characterizations for commercial purposes often fail.¹³¹ The entertainers argue that the roles they create acquire

tion deceived the public, and this imitation subsequently injured the performer's goodwill or reputation. See generally notes 126-38 *infra* and accompanying text.

126. Compare *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971), and *Davis v. TWA*, 297 F. Supp. 1145 (C.D. Cal. 1969), with *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962), and *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (1928).

127. *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 259 (1st Cir. 1962); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 622, 396 N.Y.S.2d 661, 663-64 (1977).

128. Note, *supra* note 62 at 710. See *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 715 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Lone Ranger, Inc. v. Cox*, 124 F.2d 650, 654 (4th Cir. 1942); *Gardella v. Log Cabin Prods. Co., Inc.*, 89 F.2d 891, 894 (2d Cir. 1937); *Sweet Sixteen Co. v. Sweet "16" Shop, Inc.*, 15 F.2d 920, 924 (8th Cir. 1926); *Davis v. TWA*, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969); *Chaplin v. Amador*, 93 Cal. App. 358, 360, 269 P. 544, 546 (1928).

129. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 760 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Pennsylvania Dutch Co. v. Pennsylvania Amish Co.*, [1974] 184 U.S.P.Q. 41, 45 (Pa. C.P.); *Prosser, supra* note 123, § 130, at 958.

130. *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Davis v. TWA*, 297 F. Supp. 1145 (C.D. Cal. 1969).

When there is only imitation, there is normally no deception of the public because of the awareness that the performance is a duplication. Thus, parody and mimicry are protected under the privilege of fair use. See note 11 *supra*.

131. See, e.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891 (2d Cir. 1937); *Davis v. TWA*, 297 F. Supp. 1145 (C.D. Cal. 1969). *But see* *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962); *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (1928).

secondary meanings and thus the public connects the role with that individual.¹³² Courts, however, require a strong showing of intentional use of the role or style to confuse the public.¹³³ Mere imitation of the performance does not establish the requisite intent.¹³⁴ Most cases involve attempts to protect individual renditions of songs or characters rather than pervasive characters or styles that the public identifies with a single performer.¹³⁵

The performer's ability to protect his performance is greater when he develops a unique character or style that pervades all of his performances. Courts grant relief under "passing off" for fraudulent and deceptive uses of entertainers' characterizations.¹³⁶ In *Chaplin v. Amador*,¹³⁷ another actor billed his movie as containing Charles Aplin. The court found in favor of Chaplin based on Amador's intentional "passing off" of his character as that of Chaplin.¹³⁸ The court in formulating the right of action focused on Aplin's fraudulent purpose, Chaplin's injury, and public deception.¹³⁹ The court granted relief in *Chaplin* mainly because Chaplin developed the appropriated character so well. Performances linked the character to the famous actor so effectively in the public mind that the use of it harmed the performer in his professional relationships.¹⁴⁰ In a related action, damages were recov-

132. *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891, 894 (2d Cir. 1937); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973).

133. *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891, 897 (2d Cir. 1937); *Davis v. TWA*, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969). *Cf.* *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 716 (9th Cir. 1970) (relief denied because no claim of unique sound presented and because conflict existed with song owner's copyright privileges), *cert. denied*, 402 U.S. 906 (1971).

134. *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891, 896-97 (2d Cir. 1937); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 345-47 (S.D.N.Y. 1973); *Davis v. TWA*, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969).

135. *See Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (singer attempted to protect rendition of copyrighted song), *cert. denied*, 402 U.S. 906 (1971); *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891 (2d Cir. 1937) (actress attempted to protect name "Aunt Jemima" from use by pancake manufacturer); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973) (actress who used name and likeness of copyrighted cartoon character, pursuant to license, attempted to prevent company from using similar character in commercials); *Davis v. TWA*, 297 F. Supp. 1145 (C.D. Cal. 1969) (singing group attempted to protect particular vocal sounds from use by company in song similar to one they had recorded).

136. *See* notes 137-41 *infra* and accompanying text.

137. 93 Cal. App. 358, 269 P. 544 (1928).

138. *Id.* at 364, 269 P. at 546.

139. The court stated that "[t]he right of action in such a case arises from the fraudulent purpose and conduct of appellant and the injury caused to the plaintiff thereby, and the deception to the public" *Id.*

140. *Id.* at 360, 269 P. at 545.

ered for an unconsented use of an imitation of a performer's unique voice.¹⁴¹

Prior to recovery the character performer must also prove actual competition between his performance and that of the appropriator.¹⁴² Clearly, the performer is not competing with the advertiser for the same audience. When advertisers use imitations of performers' voices, no competition exists between the product the performer creates—the performance—and the product using the imitation—the commercial advertisement.¹⁴³ Nevertheless, the performer suffers a competitive injury because the imitation's use decreases the commercial value of the performer's endorsement.¹⁴⁴ The decisions are unclear, however, with regard to the actual importance placed upon the competition element.¹⁴⁵ In fact, once there is a clear showing of public deception and injury to the performer's good will or reputation the courts may broadly interpret the competition element.¹⁴⁶

D. *Misappropriation: Whose Joke Is It?*

A comedian improvises a new routine. As he is performing it live, one member of the audience videotapes the act without the comedian's consent. The appropriator then makes copies of the videotape and offers them for sale to the general public. As a result, the comedian loses control over the use of his performance and the profits gained from such use. The comedian desires

141. See *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 257 (1st Cir. 1962).

142. See note 128 *supra*.

143. See *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891 (2d Cir. 1937); *Davis v. TWA*, 297 F. Supp. 1145 (C.D. Cal. 1969).

The competition is not even for the same audience. The commercial advertiser appeals to the television public while the performer attracts those persons interested in viewing his live performance.

144. See note 101 *supra* and accompanying text.

The commercial value is developed through the entertainer's success in attracting audiences to his performances.

145. See, e.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (no direct mention of importance of competition element), *cert. denied*, 402 U.S. 906 (1971); *Lone Ranger v. Cox*, 124 F.2d 650 (4th Cir. 1942) (court mentioned that both involved in same field, entertainment); *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891 (2d Cir. 1937) (court only stated that adequate proof of confusion is necessary); *Davis v. TWA*, 297 F. Supp. 1145 (C.D. Cal. 1969) (no mention of competition element).

146. *Accord*, *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937).

to halt the sale of the unauthorized recording and to recover the appropriator's profits.

The comedian may use the unfair competition theory of misappropriation to recover for the unconsented appropriation of his routine. Under misappropriation one may not take the property right of another for commercial benefit without due credit to the creator, even in the absence of any fraud or deception.¹⁴⁷ In other words, an appropriator "may not reap where he has not sown."¹⁴⁸ Because of the elimination of the deception or likelihood of confusion requirement, an action for misappropriation may lie in the absence of "passing off."¹⁴⁹ This theory's only restriction is that some states do not recognize misappropriation as a legitimate unfair competition cause of action and require satisfaction of the elements of "passing off."¹⁵⁰ As in other state actions previously discussed, the Copyright Act of 1976 does not preempt a

147. The United States Supreme Court first recognized misappropriation in *International News Service (INS) v. Associated Press*, 248 U.S. 215 (1918). In *INS* the Court held that it was an act of unfair competition for a rival news service to take plaintiff news organization's posted material and use it to gain a competitive advantage over plaintiff. *Id.* at 236. The Court decided the *INS* case prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and thus it does not constitute binding precedent on the issue of misappropriation. State courts, however, have adopted the reasoning of the *INS* Court and have extended the misappropriation doctrine beyond the facts of *INS*. See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Stork Restaurant, Inc. v. Sahati*, 166 F.2d 348 (9th Cir. 1948); *Veatch v. Wagner*, 116 F. Supp. 904 (D. Alaska 1953); *Uproar Co. v. NBC*, 8 F. Supp. 358 (D. Mass. 1934), *cert. denied*, 278 U.S. 670 (1936); *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969); *Capitol Records, Inc. v. Spies*, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Mutual Broadcasting Sys., Inc. v. Muzak Corp.*, 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937); *Mercury Record Prods., Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705 (1974), *cert. denied*, 420 U.S. 914 (1975).

148. *International News Service v. Associated Press*, 248 U.S. 215, 239 (1918).

149. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951). See Note, *Performer's Right of Publicity*, *supra* note 78, at 602. See also *Gieseking v. Urania Records, Inc.*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956); cases cited at note 147 *supra*.

150. See *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Davis v. TWA*, 297 F. Supp. 1145 (C.D. Cal. 1969). See notes 123-45 *supra* and accompanying text.

Courts are in conflict over the applicability of theory to appropriations of performances. Compare *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); and *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951), with *Gee v. CBS, Inc.*, 471 F. Supp. 600 (E.D. Pa. 1979), and *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973).

cause of action for misappropriation in this context.¹⁵¹

The comedian may recover under misappropriation after establishing a property interest in his act. Courts often characterize this property interest as quasi-property, for it derives from the ability to exclude others from using a creation or idea developed through the investment of time, effort, and money.¹⁵² Under this theory, the comedian is protected against another's intentional appropriation of his work product.¹⁵³

Because misappropriation is a competitive tort, the comedian must further prove the existence of some competition¹⁵⁴ with the appropriating audience member. The competition requirement is loosely inter-

151. See notes 29-32 *supra* and accompanying text.

Moreover, there is much disagreement over whether misappropriation provides equivalent rights to copyright. See note 35 *supra*. The rationale behind the misappropriation remedy is not to grant a monopoly to the creator for his work product, but rather to permit him to benefit from his investment. See *Mercury Record Prods., Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 175, 218 N.W.2d 705, 710 (1974), *cert. denied*, 420 U.S. 914 (1975); Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Preemption Doctrine*, 71 COLUM. L. REV. 1444 (1971).

In *CBS v. DeCosta*, 377 F.2d 315 (1st Cir.), *cert. denied*, 389 U.S. 1007 (1967), the court discussed the application of misappropriation to an entertainer's claim. In *DeCosta*, decided prior to the Copyright Act of 1976, the court denied the performer recovery against a television network that misappropriated the performer's character. The performer claimed that by creating the character role of Paladin, traveling through the country as this character, and passing out cards stating "Have Gun Will Travel," he had developed a protectible property interest that CBS had misappropriated in its television series "Have Gun Will Travel." *Id.* at 316. The court held, however, that the printing of the cards was a publication for purposes of copyright and thus plaintiff waived any rights in the character. *Id.* at 321.

If a court decided *DeCosta* today the result might be different, although the action would be copyright infringement and not misappropriation. For later developments in this case, see *DeCosta v. CBS*, 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

152. "Quasi-property is a fiction utilized to protect the plaintiff against unfair competitive practices of the defendant. . . . 'Quasi-Property' differs from traditional concepts of property in that it will be employed only to protect the plaintiff against a competitor rather than the public at large." Comment, *supra* note 22, at 843. See *International News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918); *Waring v. Dunlea*, 26 F. Supp. 338, 340 (E.D.N.C. 1939); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490, 492 (W.D. Pa. 1938); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 797, 101 N.Y.S.2d 483, 493 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 437, 194 A. 631, 634 (1937).

153. See note 152 *supra*.

154. The creator of the work product may find that the demand for his product has declined as a result of the misappropriation. Thus, the creator actually finds himself competing with his own work product.

preted.¹⁵⁵ It permits recovery for either direct¹⁵⁶ or indirect¹⁵⁷ competition. Consequently, under misappropriation a creator may recover against someone who uses the creator's work product in a different manner or to a different extent than the creator.¹⁵⁸

In the entertainment field, courts enjoin unauthorized uses of recordings of live performances.¹⁵⁹ In situations involving direct competition, the appropriators and the performers use the same medium to disseminate the performances.¹⁶⁰ In an indirect competition case the performers recovered when a recording company taped their live radio performances and sold them to the public.¹⁶¹ In this case, however, the performers had already granted another company the exclusive right to record and sell the performances.¹⁶² The court granted the performers a preliminary injunction although the actual competition existed between the performers' assignee and the other recording company.¹⁶³

155. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 796, 101 N.Y.S.2d 483, 492 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

156. Direct competition "exists where the defendant is exploiting the performer's work commercially in the *same medium and in the same manner* as the performer." Comment, *supra* note 22, at 845. See, e.g., *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (1928).

157. Indirect competition exists when the "injury results from defendant's conduct in commercially exploiting the performance in a *different* manner than that presently employed by the performer." Comment, *supra* note 22, at 845. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

158. See notes 156-57 *supra*. There is no protection afforded against the general public. The Supreme Court recognized this in *International News Serv. v. Associated Press*, 248 U.S. 215 (1918):

The question here is not so much the rights of which party as against the public, but their rights as between themselves [A]lthough we may and do assume that neither party has any remaining property interest as against the public . . . it by no means follows that there is no remaining property interest in it as between themselves.

Id. at 236.

159. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 805, 101 N.Y.S.2d 483, 500 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 455, 194 A. 631, 641-42 (1937).

160. *Waring v. Dunlea*, 26 F. Supp. 338, 339 (E.D.N.C. 1939); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 440, 194 A. 631, 640 (1937).

161. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 790, 101 N.Y.S.2d 483, 487 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

Under the 1976 Act, these performances are protectible under federal copyright if simultaneously recorded when transmitted. See notes 25-28 *supra* and accompanying text.

162. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 789-90, 101 N.Y.S.2d 483, 486-87 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

163. *Id.* at 805, 101 N.Y.S.2d at 500.

Thus, the lack of direct competition between performers and the misappropriator did not affect the ability to recover. Courts also grant relief under misappropriation for tape piracy when there is direct competition between the creator and the appropriator.¹⁶⁴

Additionally, the misappropriation theory requires the comedian to establish injury as a result of the appropriation.¹⁶⁵ The unauthorized, uncompensated use must commercially benefit the appropriator. The appropriator is unjustly enriched because he has not invested his own money in the development of the creation and has not compensated the creator for its use. Courts liberally interpret the injury requirement. Relief under misappropriation is predicated on the creator's commercial loss or damaged reputation¹⁶⁶ and not on deception or likelihood of public confusion.¹⁶⁷ Performers can recover for injury to professional reputation because of the effect on future commercial success.¹⁶⁸ Performers can also recover for unauthorized uses of recordings¹⁶⁹ as well as takings of unique vocal styles for a commercial advertisement.¹⁷⁰

The comedian's recovery is easiest under misappropriation. To re-

164. See note 11 *supra*.

165. Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 804, 101 N.Y.S.2d 483, 499 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

There is no unfairness in an appropriation unless the owner of the property suffers some loss as a result of the appropriation, normally in the form of lost profits. See Ahrens, *The Misappropriation Doctrine After Sears-Compco*, 2 U.S.F.L. REV. 292 (1968); Comment, *supra* note 22, at 848.

166. "The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of . . . commercial immorality." Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 796, 101 N.Y.S.2d 483, 492 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

167. The uncompensated use injures the creator, not the general public. "Generally the public interest is important only negatively. To justify any regulation of competition, it need not be shown that it is positively advantageous to the public, but only that the public is not harmed thereby." Callman, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595, 599 (1942). See also Comment, *supra* note 22, at 841-42.

168. Comment, *supra* note 22, at 848. See, e.g., *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

169. Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 805, 101 N.Y.S.2d 483, 500 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 443, 194 A. 631, 640-41 (1937).

170. *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 258 (1st Cir. 1962). But see *Gee v. CBS*, 471 F. Supp. 600, 659 (E.D. Pa. 1979).

cover for the unauthorized videotaping of his act, the comedian must show that the appropriator took his property without consent; that this taking injured him, and that indirect competition for the same audience existed at the time.

IV. EFFECTIVENESS OF RELIEF FOR APPROPRIATIONS OF PERFORMANCES

There is no unified law for the right of performance. Piecemeal state law protection of performance interests inadequately compensates entertainers for their contributions and discourages further development of the creative arts. Protection for performers' intangible interests¹⁷¹ is unrealistic because, absent any commercial loss, concrete injury is difficult to prove. The inability of state law effectively to protect performers' commercial interests, therefore, demonstrates the need for reform.¹⁷² The following proposed model code provides a uniform right of performance by incorporating the elements of the state actions most protective of performers' commercial interests. Concomitantly, this proposal illustrates the weaknesses in existing state law theories.

V. PROPOSED MODEL CODE FOR RIGHTS OF PERFORMANCE

Section 1: The Right of Performance

One who takes a performance of a creator, or its by products, without consent from and compensation to the creator, for any use in which the public is involved, will be liable for damages and/or equitable relief resulting from such use.

This section addresses the basic failure of state law to define precisely performers' rights in their original creations. It combines all of the rights currently offered to performers by state laws.¹⁷³ Taken separately, however, each state action in some way impedes the performer's

171. For an explanation of these intangible interests see notes 12-13 *supra* and accompanying text.

172. See notes 66-71, 98-104, 131-35, 142-45 & 150 *supra* and accompanying text.

173. All the actions recognize a property interest. See notes 66-71, 90-97, 126-27 & 152-53 *supra* and accompanying text. The right of publicity compensates for takings of performance byproducts. See notes 78 & 103-04 *supra* and accompanying text. Passing off contains the public recognition element. See notes 126-27 *supra* and accompanying text. Finally, misappropriation contains the indirect competition element. See notes 154-64 *supra* and accompanying text. Additionally, in misappropriation the use need not be deceptive. See note 149 *supra* and accompanying text.

recovery for unauthorized appropriations.¹⁷⁴

The model code recognizes that any public use of the performance commercially injures the creator. It is not limited to deceptive or confusing uses as in "passing off."¹⁷⁵ Moreover, it eliminates any direct competition requirement that may hinder a performer's recovery.¹⁷⁶ In effect, this section of the code combines the elements of the right of publicity¹⁷⁷ and misappropriation,¹⁷⁸ with the added requirement of public recognition. Section 1 follows state law in refusing recovery for injury to reputation alone.¹⁷⁹ Nevertheless, if commercial loss results, recovery is available.

Section 2: Definition of Performance

A protectible performance exists if the entertainer has transformed an original idea into a concrete creation that is exhibited to the public in an intangible form of expression and the public thereafter associates that concrete creation with the entertainer.

- (1) The concrete creation is the expression of an original style, characterization, or voice.
- (2) The concrete creation, to be the property of the entertainer, must result from the investment of time, effort, or money. If such concrete creation occurs the entertainer has complete control over its use. It may be subject to contract or assignment and is descendible.
- (3) The byproducts of a performance are the values given the creator's name, likeness, and personality.

State law contains no identifiable definition of a protectible performance.¹⁸⁰ The model code provides a workable definition that enables performers to know what creations are protected. The code requires expression of the idea in a creation. This is in conformity with the generally recognized principle that there can be no monopoly of an idea.¹⁸¹ The intangibility requirement in the code is necessary to avoid copyright preemption.¹⁸²

Section 2 also includes the "passing off" requirement of secondary

174. See notes 73-76, 105-20, 131-35, 142 & 150 *supra* and accompanying text.

175. See notes 128-30 *supra* and accompanying text.

176. See notes 142-45 *supra* and accompanying text.

177. See notes 78-122 *supra* and accompanying text.

178. See notes 147-70 *supra* and accompanying text.

179. See note 13 *supra*.

180. See notes 4-11 *supra* and accompanying text.

181. See notes 8-9 *supra* and accompanying text.

182. See notes 29-38 *supra* and accompanying text.

meaning.¹⁸³ Public association of the performance with the performer is necessary to prove the performers' commercial loss. Under this section distinctive characters as well as concrete performances are protected.

The code gives performers property rights in their creations analogous to rights some state laws grant.¹⁸⁴ Under the code, however, the right in the creation is fully descendible and assignable.¹⁸⁵ Thus, the performer has greater control over his creation.

Section 3: Infringement of the Right of Performance

(a) Imitation of a performance before a limited audience, not coupled with a commercial loss to the creator, and without the intent to confuse the public into thinking the imitator is the creator, is not an infringing use.

(b) Any unauthorized, uncompensated use of the performance by another entertainer, advertiser, or any other person, other than an imitation defined in part (a) above, that detracts from the creator's ability to attract audiences to the performance or decreases the ability to market the by-products of the performance infringes the creators' right of performance.

Under this part it is unnecessary to show:

(A) direct competition between the creator and the other user of the performance;

(B) actual deception or likelihood of confusion to the public because of the unauthorized use.

Part (a) of this section is in conformity with case law denying recovery for mere imitation.¹⁸⁶ A performer can recover for imitation, however, if he shows commercial loss and public confusion. Recovery for mere imitation would not compensate the performer for economic loss and may in fact infringe upon the first amendment rights of another performer. The code grants recovery when the imitation is used for wrongful purposes.

In cases not involving imitation, the code does not require a showing of public deception. Thus, any unconsented use imposing a commercial loss upon a performer is actionable. This provision eliminates the major problem in the "passing off" theory.¹⁸⁷ Moreover, the code's re-

183. See notes 126-27 *supra* and accompanying text.

184. See notes 66-71, 90-102, 126-27 & 152-53 *supra* and accompanying text.

185. California does not recognize the descendibility of the right. See notes 111-14 *supra* and accompanying text.

186. See notes 9 & 131-34 *supra* and accompanying text.

187. See notes 128-34 *supra* and accompanying text.

laxation of the direct competition requirement¹⁸⁸ gives performers greater flexibility in recovering for unconsented appropriations.

Another improvement the code offers is its explanation of an infringing commercial use. Although some state law theories remedy commercial losses,¹⁸⁹ none provides a precise description of an infringing use. The code provides both performers and potential infringers with guidelines for determining whether a particular use will infringe upon the performers' rights. Moreover, because there is a lack of case law concerning common-law copyright after the 1976 Act, the boundaries of infringement are clarified.

Section 4: Burden of Proof

- (a) To recover under this act the creator must prove:
- (1) that the performance was the transformation of the creator's original idea into a concrete creation;
 - (2) that he has not intentionally waived his rights in the performance;
 - (3) that another person has taken the performance without his consent; and
 - (4) that he has suffered commercial losses as a result of the unauthorized use of the performance.
- (b) Any person charged with an infringement of the right of performance may defend by proving that the unauthorized use was in furtherance of legitimate overriding first amendment rights.

Section 4 delineates the elimination of some of the state law barriers to recovery for appropriations of performances. In resolving the question of when a work is released into the public domain, the code states that only a performer's intentional action will dedicate his creation to the public. This clarifies the present ambiguity in common-law copyright.¹⁹⁰ Additionally, the requirement that the performance remain intangible reduces the possibility that the federal Copyright Act will preempt the cause of action if the rights protected are found to be equivalent to copyright.¹⁹¹ Finally, the code gives a performance the same protectible status as its byproducts. This conforms to the inclusion of performances in the right of publicity enunciated in two recent

188. See notes 142-45 *supra* and accompanying text.

This code follows the misappropriation approach to competition. See notes 154-64 *supra* and accompanying text.

189. See notes 71, 90-97, 103-04, 136-41 & 166-70 *supra* and accompanying text.

190. See notes 73-76 *supra* and accompanying text.

191. See notes 29-38 *supra* and accompanying text.

cases.¹⁹²

Section 5: Relief for Infringement

(a) Upon satisfaction of the burden of proof the creator is entitled to recover:

(1) Actual commercial damages to compensate for the injury caused by the unauthorized use. The injury suffered must be either to the marketability of the performances' byproducts, the advertising value of the creator's endorsement or the creator's ability to attract future audiences to the performance.

(2) Equitable relief in the form of:

(A) injunctions to prevent the continued or future unauthorized use of the performance, and

(B) an accounting to the creator for profits the creator lost because of the unauthorized use.

(b) The creator's claim under this code will be given reciprocity in the states enacting this code provided the creator has established that public recognition of the performance crosses state boundaries.

This section provides for both legal and equitable relief for infringement of the right of performance. Although state law grants monetary damages in entertainers' actions,¹⁹³ the cases are not explicit in indicating the performance's legal status. State actions for right of publicity and misappropriation grant equitable injunctive relief to protect the entertainer from further unauthorized exploitation.¹⁹⁴ Again, however

192. *Groucho Marx Prods., Inc. v. Day & Night Co.*, No. 80-2310 (S.D.N.Y. Oct. 5, 1981); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981). In some cases, however, the taking of the performance must injure the marketability of the personality characteristics. Performers can prove actual loss only from injury to the characteristics. See notes 103-05 *supra* and accompanying text.

193. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977); *Price v. Worldvision Enterprises, Inc.*, 455 F. Supp. 252, 266 (S.D.N.Y. 1978); *Price v. Hal Roach Studios*, 400 F. Supp. 836, 847 (S.D.N.Y. 1975); *Hogan v. A.S. Barnes & Co., Inc.*, [1957] 114 U.S.P.Q. (BNA) 314, 321 (Pa. C.P.); *CBS v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 725-26, 248 N.Y.S.2d 809, 812 (Sup. Ct. 1964). Cf. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978) (preliminary injunction granted because monetary damages difficult to measure). See also *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Redmond v. Columbia Pictures Corp.*, 277 N.Y. 707, 14 N.E.2d 636 (1938); *Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941).

"[C]ommon-law copyright will be protected by injunction and, once infringed, remedied by general, special or even punitive damages." Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. REV. 233, 252 (1977). See, e.g., *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963); *CBS v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964).

194. For cases on the right of publicity see *Price v. Worldvision Enterprises, Inc.*, 455 F. Supp.

the reasons for granting equitable relief are unclear. Either the performer's right in the performance¹⁹⁵ or the inadequacy of the legal remedy are possible rationales.¹⁹⁶ The injunctive relief does not compensate for past commercial losses. The code permits a performer to recover commercial losses and prevent continued unauthorized use of the performance. Thus, it provides for an accounting and recognizes the restitutionary theory of unjust enrichment.

The last provision in section 5 is a reciprocity section. An important limitation of state protection of performances are state boundaries. Thus, one state's protection of certain elements of a performance is no guarantee that another state will provide the same protection. The code provision eliminates this key restriction.

VI. CONCLUSION

The rights of entertainers in unrecorded live performances are inadequately protected. Performers are forced to rely on state law because

252, 266 (S.D.N.Y. 1978); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978); *Price v. Hal Roach Studios*, 400 F. Supp. 836, 846-47 (S.D.N.Y. 1975); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 819, 603 P.2d 425, 428, 160 Cal. Rptr. 323, 326 (1979).

For cases involving misappropriation see *Waring v. Dunlea*, 26 F. Supp. 338, 340 (E.D.N.C. 1939); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490, 494 (W.D. Pa. 1938); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 804, 101 N.Y.S.2d 483, 499-500 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 453, 194 A. 631, 641 (1937).

Courts also grant injunctions to enjoin passing off. *See, e.g.*, *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (1928). The court issued an injunction in this case because plaintiff had developed his character so well that it had become synonymous in the public mind with him individually. No alternative remedy would redress the harm to the plaintiff. *Accord*, *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962). *See generally* D. DOBBS, *THE LAW OF REMEDIES* § 6.6 (1973).

195. *See* note 193 *supra*. In these cases courts have granted permanent and preliminary injunctive relief. When permanent relief is awarded, the performer's property right in his performance is more clearly established. This is because the appropriator is perpetually enjoined from using the performer's work product without his consent, thus giving the performer a monopoly over the performance. This enables him to control the dissemination of that performance and to reap the financial rewards arising from such use.

The award of a preliminary injunction does not clearly establish a property right in the performance. This is because the prerequisites for granting a preliminary injunction are likelihood of success on the merits and the need to preserve the status quo in order to prevent irreparable injury. This latter requirement exists when the remedy at law is inadequate. *See* *Sonesta Int'l Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247 (2d Cir. 1973); *Bonner v. Westbound Records*, 49 Ill. App. 3d 543, 364 N.E.2d 570 (1977). The fact that the performer may succeed on the merits or be irreparably harmed may have nothing to do with any property right that he has in his performance.

196. *See, e.g.*, *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978).

these creative works are outside the scope of the Copyright Act of 1976. Because there is no unified right of performance under state law, performers must rely on a variety of state actions for relief. No existing theory, however, sufficiently protects performers' commercial and artistic interests.

Society must recognize and protect performers' economic performance interests to promote further creative development of the performing arts. The proposed model code will guarantee this protection and ensure continued vitality in the entertainment field.

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