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# PUBLICITY RIGHTS IN THE UNITED STATES AND GERMANY: A COMPARATIVE ANALYSIS

*Susanne Bergmann\**

## I. INTRODUCTION

The advertising industry takes advantage of entertainment and sport celebrities to enhance the marketability of products and services. Actors, singers and athletes tell us which drink they prefer, which pasta they eat and which car they drive in order to influence a consumer's purchasing decisions. A lucrative market has also developed for merchandise bearing the names or likenesses of celebrities. As a result, endorsement fees paid to celebrities continue to grow and now constitute a significant percentage of their income.

In order to protect the commercial interests of celebrities, United States courts developed the right of publicity, a concept originally rooted in the right of privacy.<sup>1</sup> The right of privacy focuses on injuries to a person's dignity and state of mind, measured by mental distress damages. In contrast, the right of publicity protects the potential commercial value of a person's identity and grants the individual the right to control the commercial exploitation of their name, likeness or personality. The right of publicity is essentially a freely assignable property right and is the basic framework for endorsement transactions.<sup>2</sup>

Germany does not recognize a right comparable to the U.S. right of publicity. However, celebrities may proceed against an

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1. Charles Warren and Louis Brandeis first propounded the right of privacy in their article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), which the New York Court of Appeals rejected in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. Ct. App. 1902). However, in 1903, in reaction to *Roberson*, the New York legislature enacted a privacy statute which imposed liability for unauthorized use of a person's name, portrait, or picture for advertising purposes. N.Y. CIV. RIGHTS LAW §§ 50-51 (West 1992 & Supp. 1999).

2. See J. THOMAS MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY § 10.2[A] (1995) [hereinafter MCCARTHY ON PUBLICITY].

unauthorized use of their identity, citing the commercial value at stake. Statutes provide for the protection of a person's identity, such as likeness or name.<sup>3</sup> Beyond these statutory rights, it has been the task of the German courts to fill in the gaps and protect other aspects of a person's identity. On a case-by-case basis, the courts have developed a "general right of personality" (*allgemeines Persönlichkeitsrecht*) which is an elaborate system of protection against defamation and unauthorized exploitation of a person's commercial value.<sup>4</sup> This Article analyzes and compares the approaches taken by American and German courts to protect the commercial value of celebrities identities.

## II. THE RIGHT OF PUBLICITY IN THE UNITED STATES

### A. Development of the Law

The right of publicity in the U.S., a relatively recent development, first appeared in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>5</sup> Haelan involved two rival chewing gum manufacturers, that both packaged their products with baseball cards.<sup>6</sup> Contracts made with some players assured Haelan that it would have the exclusive right to use the athletes' photographs and provided that the players could not grant similar rights to any other gum manufacturer.<sup>7</sup> However, Topps continued to produce baseball cards and closed contracts with some of the same athletes, despite their knowledge of the player's contractual obligations to Haelan.<sup>8</sup> In the instances where Topps acted alone convincing players to breach their contractual obligations, Haelan had a valid claim that Topps had tortuously induced the players to breach their contracts.<sup>9</sup> However, Haelan lacked any claim against Topps in instances where Topps obtained grants through an independent agent or used the pictures without the players consent.<sup>10</sup> Those players had not granted Haelan the right to sue on their behalf, and lacked any mental

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3. §12 BGB; §§ 22-23 KUG.

4. See discussion *infra* Part III.A.

5. 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

6. *Id.* at 867.

7. *Id.*

8. *Id.*

9. *Id.* at 869.

10. *Id.*

distress, a prerequisite for a valid claim under right of privacy.<sup>11</sup> In order to grant Haelan relief, the court recognized that, "in addition to and independent of that right of privacy . . . a [person] has a right [to] the publicity value of [their] photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . . This right might be called a 'right of publicity.'"<sup>12</sup> This gave Haelan, as the holder of an exclusive grant of the right to use certain players' images, a valid claim against Topps.<sup>13</sup>

At its outset, the right of publicity received skepticism<sup>14</sup> and courts were reluctant to apply it.<sup>15</sup> In the 1970's, case law began to recognize a distinction between the right of privacy and the right of publicity.<sup>16</sup> In 1977, the U.S. Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>17</sup> gave the right of publicity national recognition. Zacchini, a circus artist, performed as a "human cannon ball."<sup>18</sup> A local broadcasting company videotaped his performance and broadcasted the entire fifteen second performance as part of its evening news program without Zacchini's consent.<sup>19</sup> The Court recognized that because the program broadcast Zacchini's entire act, it posed "a substantial threat to the economic value of his performance,"<sup>20</sup> and, therefore, violated his right of publicity.<sup>21</sup>

Courts and scholars alike have cited several reasons for recognizing the right of publicity. First, the right of publicity aims to secure the economic value of an individual's identity and prevent

11. *Haelan*, 202 F.2d at 869.

12. *Id.* at 868.

13. *Id.* at 869.

14. See Strickler v. National Broad. Co., 167 F. Supp. 68, 70 (S.D. Cal. 1958). But see Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). Prosser divided the tort of invasion of privacy into four categories: (1) intrusion upon plaintiff's physical solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Id.*

15. See 1 MCCARTHY ON PUBLICITY, *supra* note 2, § 1.9[A].

16. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824-25 (9th Cir. 1974); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1280-81 (D. Minn. 1970).

17. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

18. *Id.* at 562.

19. *Id.*

20. The court did not accept the First Amendment defense on the grounds that this privilege did not encompass the right to broadcast the performer's entire act without his consent. *Id.* at 574-75; see *infra* Part II.C.2.

21. *Zacchini*, 433 U.S. at 576.

unjust enrichment to the infringer.<sup>22</sup> These authorities contend that celebrities invest considerable money, time, and energy into developing the ability to attract attention and “evoke a desired response in a particular consumer market.”<sup>23</sup> Therefore, they should “reap the reward of [their] endeavors.”<sup>24</sup> Second, the right of publicity protects against the dilution of celebrities’ commercial value through excessive unauthorized uses.<sup>25</sup> Furthermore, as the Court in *Zacchini* noted, protection “provides an economic incentive”<sup>26</sup> for performers to produce entertaining and intellectual works, which is “analogous to the goals of patent and copyright law.”<sup>27</sup>

The right of publicity is now considered an independent doctrine which is distinct from the right of privacy.<sup>28</sup> It has been recognized in twenty-five states, either by statute or common law.<sup>29</sup> Although the basic concept of the right of publicity is clear, each state has its own criteria for establishing a claim. For example, criteria concerning which aspects of a person’s identity are protectable,<sup>30</sup> whether the right is descendible or which remedies are available vary among states.<sup>31</sup>

## *B. Protected Aspects of a Person’s Identity*

### 1. Likeness and Picture

The commercial use of a person’s identity can be embodied in a photograph,<sup>32</sup> drawing,<sup>33</sup> or film. In order to find an appropriation, the person must be identifiable in the depiction.<sup>34</sup> The issue of

22. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983).

23. *See Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 350 (Cal. Ct. App. 1983); *see also Uhlaender*, 316 F. Supp. 1282; *Nimmer, supra* note 14, at 230.

24. *Zacchini*, 433 U.S. at 573.

25. *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 138 (Wis. 1979).

26. *Zacchini*, 433 U.S. at 576.

27. *Id.*; *see Estate of Presley v. Russen*, 513 F. Supp. 1339, 1358 n.18 (D.N.J. 1983).

28. *See* 1 MCCARTHY ON PUBLICITY, *supra* note 2, § 6.1[B].

29. *Id.*

30. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

31. 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 6.3[A].

32. According to a California statute, “photograph” means as any “photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.” CAL. CIV. CODE § 3344(b) (West 1997).

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

34. *See, e.g.*, CAL. CIV. CODE § 3344(b)(1) (West 1997). “A person shall be deemed to be

identification was discussed in *Ali v. Playgirl, Inc.*<sup>35</sup> There, *Playgirl Magazine* depicted a nude black man seated in the corner of a boxing ring.<sup>36</sup> The depiction was not an actual photo, but "an illustration falling somewhere between representational art and cartoon . . . ."<sup>37</sup> The court found that even after a cursory inspection of the picture, the figure was identifiable as Muhammad Ali.<sup>38</sup>

Identification was more difficult to determine in *Cohen v. Herbal Concepts, Inc.*,<sup>39</sup> the "Nude Back" case which involved an advertisement for an anti-cellulite product. The advertisement in *Cohen* depicted two nude women, shown only from behind.<sup>40</sup> Although their faces were not visible, the plaintiff's husband recognized the women as his wife and daughter.<sup>41</sup> The defendants contended that the husband only recognized his wife and daughter because he was present when the picture was taken.<sup>42</sup> The New York Court of Appeals disagreed, concluding that a person could be identified without facial features being shown.<sup>43</sup> The court stated, "[t]he identifying features of the subjects include their hair, bone structure, body contours and stature and their posture,"<sup>44</sup> enough that "someone familiar with the persons in the photograph could identify them by looking at the advertisement."<sup>45</sup>

Another issue concerning identification is whether the use of a look-alike in an advertisement falls within the scope of protection of the right of publicity. In *Onassis v. Christian Dior-New York, Inc.*,<sup>46</sup> the defendant published an ad featuring a photograph of an imaginary wedding.<sup>47</sup> The photograph depicted several celebrities

readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use." *Id.*

35. *See Ali*, 447 F. Supp. at 723.

36. *Id.*

37. *Id.* at 727.

38. *Id.* at 726.

39. 482 N.Y.S.2d 457 (1984).

40. *Id.* at 458.

41. *Id.*

42. *Id.* at 460.

43. *See* 1 MCCARTHY ON PUBLICITY, *supra* note 2, § 4.12[B].

44. *Cohen*, 482 N.Y.S.2d at 460.

45. *Id.*

46. 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984), *aff'd without opinion*, 488 N.Y.S.2d 934 (N.Y. App. Div. 1985).

47. *Id.* at 257.

and a woman who bore a striking resemblance to Jacqueline Kennedy Onassis.<sup>48</sup> Dior argued that the advertisement was protected because they had not used a photograph of Jackie Onassis.<sup>49</sup> The New York Supreme Court rejected this argument and issued an injunction against the use of the ad. The court held:

A photograph may be a depiction only of the person before the lens, but a "portrait or picture" gives wider scope, to encompass a representation which conveys the essence and likeness of an individual, not only [in] actuality, but the close and purposeful resemblance to reality . . . . No one is free to trade on another's name or appearance and claim immunity because what he is using is similar to but not identical with the original.<sup>50</sup>

Accordingly, "[w]hen . . . the look-alike seems indistinguishable from the real person and the context of the advertisement clearly implies that he or she is the real celebrity,"<sup>51</sup> the look-alike's depiction can be considered a picture or portrait of the celebrity.<sup>52</sup> Thus, an infringement of the right of publicity will apply to the use of look-alikes or celebrity impersonators.<sup>53</sup>

## 2. Name and Nickname

A person's name is protected by the right of publicity.<sup>54</sup> Imagine the following advertisement, "Michael Jackson might be a great singer, but he has never tried Coca Cola! Why don't you?" If Michael Jackson had never consented to the use of his name, he would be entitled to protection. Because the hypothetical advertisement does not imply any endorsement by the singer, a claim for false endorsement under section 43(a) of the Federal Lanham Act would fail.<sup>55</sup> However, the use of Jackson's name is an infringement of his right of publicity.

48. *Id.* at 256-57.

49. *Id.* at 260.

50. *Id.* at 261.

51. *Allen v. National Video, Inc.*, 610 F. Supp. 612, 623 (S.D.N.Y. 1985).

52. *Id.*; see *Estate of Presley*, 513 F. Supp. at 1349 (D.N.J. 1981) (finding that "a reasonable viewer upon seeing the pictures alone would likely believe the individual portrayed to be Elvis Presley.").

53. *Id.*

54. *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1280-81 (D. Minn. 1970).

55. J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:14, 28-17 (1995) [hereinafter MCCARTHY ON TRADEMARKS]. "[T]he premiere federal vehicle for private assertion of rights against false advertising is § 43(a) of the Lanham Act, which is an appropriate vehicle for the assertion of private claims against false endorsement by the

Similar to likenesses and pictures, the identification of a person is also critical when their name is used. If a person is known or easily recognizable by his or her first name, the use of this name may be sufficient to be an appropriation. Some examples of celebrity names include Cher,<sup>56</sup> and "John, Paul, George and Ringo."<sup>57</sup> In addition, the same right of publicity protection also applies to nicknames.<sup>58</sup>

A difficult question of identification was raised in *Carson v. Here's Johnny Portable Toilets, Inc.*<sup>59</sup> In *Carson*, the defendant had used the name "Here's Johnny" for a portable toilet service, and the court examined whether this slogan was sufficient enough to identify the plaintiff.<sup>60</sup> The court of appeals found a violation of Carson's right of publicity although his complete name or picture had not been appropriated.<sup>61</sup> However, the court noted that there would not have been a violation of Carson's right of publicity if the defendant had used Carson's full name in its advertisement.<sup>62</sup> Because Carson derived his celebrity identity from the phrase "Here's Johnny," the defendant's use of Carson's full name, John William Carson, would have not misappropriated Carson's identity as a celebrity.<sup>63</sup>

### 3. Voice

Historically, courts were reluctant to grant right of publicity protection in cases regarding sound-alikes.<sup>64</sup> But, in *Midler v. Ford*

unpermitted use of the persona of a person." *Id.*

56. *Cher v. Forum Int'l Ltd.*, 692 F.2d 634 (9th Cir. 1982).

57. *Apple Corps Ltd. v. Adirondack Group*, 476 N.Y.2d 716, 718-19 (1983). "Four persons named 'John, Paul, George and Ringo' will not be taken by the public as a reference to the Moskowitz Brothers, to the Pope and two other people, or to anyone else except the members of the best known singing group in the world." *Id.*

58. *Hirsch v. S. C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979). In *Hirsch*, the plaintiff Elroy Hirsch, a former football star, was known by his nickname "Crazylegs." *Id.* The defendant marketed their shaving gel for women under this name. The court held that the fact that the name "Crazylegs" was a nickname rather than "Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identifies the wronged person." *Id.* at 137.

59. 698 F.2d 831 (6th Cir. 1983).

60. *Id.* The defendant used the phrase "Here's Johnny" to associate their product with the plaintiff, Johnny Carson. *Id.* at 837.

61. *Id.* at 836.

62. *Id.* at 837.

63. *Id.*

64. See *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (refusing to grant protection to the plaintiff because he did not own the copyright to the song used in the



*Motor Co.*,<sup>65</sup> the Ninth Circuit changed the judicial attitude toward such imitations through their interpretation of the existing California statute.<sup>66</sup> In *Midler*, Ford Motor Company wanted to run an advertisement using Midler's hit song, "Do You Want to Dance."<sup>67</sup> When Midler rejected the offer to sing in the commercial, the advertising agency hired a former backup vocalist of Midler's and instructed her to "sound as much as possible like [] Bette Midler . . . ."<sup>68</sup> Ford Motor Company, like the defendants in *Onassis*, argued that it was in compliance with California Civil Code section 3344, because it had not used Midler's name, voice, signature, photograph or likeness in its advertisement.<sup>69</sup> While the court agreed, it held that the statute did not preclude Midler from pursuing a common law right of publicity cause of action.<sup>70</sup> The court held Ford liable for a common law violation emphasizing that,<sup>71</sup> "A voice is as distinctive and personal as a face . . . . To impersonate her voice is to pirate her identity."<sup>72</sup>

Shortly after the *Midler* ruling, Frito-Lay commenced an advertisement campaign using a jingle inspired by Tom Waits's song "Step Right Up."<sup>73</sup> The advertising agency that produced the advertisement was aware that Waits refused to appear in any kind of advertisement, and therefore did not even ask Waits for his consent.<sup>74</sup> Instead, the advertising agency searched for a singer who could imitate his distinctive voice.<sup>75</sup> Waits sued Frito-Lay and the advertising agency alleging a misappropriation claim under California law and a false endorsement claim under the Lanham Act.<sup>76</sup> The Ninth Circuit, relying on *Midler*, found that Frito-Lay misappropriated Waits's voice.<sup>77</sup>

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defendant's advertisement); see also *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973) (limiting "a performer's right of protection against imitators.").

65. 849 F.2d 460 (9th Cir. 1988).

66. CAL CIV. CODE § 990 (West 1997); CAL. CIV. CODE § 3344 (West 1997).

67. *Midler*, 849 F.2d at 461-62.

68. *Id.* at 461.

69. *Id.* at 463.

70. *Id.*

71. *See id.* at 463.

72. *Id.*

73. *Waits v. Frito-Lay, Inc.*, 978 F.2d. 1093, 1097 (9th Cir. 1992).

74. *Id.*

75. *Id.* at 1097-98.

76. *Id.* at 1093.

77. *Id.* at 1098.

## 4. Identifying Objects

Like a picture, name, or voice, a physical object can be a means of identification. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*,<sup>78</sup> the court found that when an object is so closely related to a person that their persona can be identified by mere reference to that object, a right of publicity violation has occurred.<sup>79</sup> In that case, Motschenbacher, a famous race car driver, successfully sued for the unauthorized use of a picture of his distinctive race car. Although Motschenbacher was unrecognizable in the photograph, the court pointed out that even though some minor stylistic changes were made, the markings were unique to the plaintiff's car, causing some persons to think the car in question was plaintiff's.<sup>80</sup>

A decision widely criticized as "overextending" the right of publicity<sup>81</sup> was *White v. Samsung Electronics America, Inc.*<sup>82</sup> In *White*, the defendants created an advertisement parodying the popular game show *Wheel of Fortune*.<sup>83</sup> The advertisement depicted a robot dressed in a gown, wig, and jewelry which was intended to imitate the game show's hostess, Vanna White.<sup>84</sup> The set for the advertisement was immediately recognizable as that of *Wheel of Fortune*. White sued Samsung for both infringement of her California statutory and common law right of publicity and false endorsement under the Lanham Act.<sup>85</sup> The defendants argued that the ad was a spoof of *Wheel of Fortune*.<sup>86</sup> The court denied the plaintiff's claim for infringement of California Civil Code section 3344 because the robot could not be considered a likeness within the meaning of this provision.<sup>87</sup> However, the court held that Samsung

78. 498 F.2d 821 (9th Cir. 1974).

79. *Id.* at 827.

80. *Id.*

81. See, e.g., Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97, 107 (1993); Steven C. Clay, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485 (1994); William M. Heberer III, *The Overprotection of Celebrity: A Comment on White v. Samsung Electronics America, Inc.*, 22 HOFSTRA L. REV. 729, 748 (1994). But see 2 MCCARTHY ON PUBLICITY, *supra* note 2, at app. A.

82. 971 F.2d 1395 (9th Cir. 1992).

83. *Id.* at 1396.

84. *Id.*

85. *Id.*

86. For the parody defense, see *infra* discussion Part II.C.1.

87. *White*, 971 F.2d at 1397.

had violated White's common law right of publicity.<sup>88</sup> The court pointed out that appropriations of identity do not have to be accomplished by particular means:

It is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so . . . . A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.<sup>89</sup>

Thus, the court stated that taken as a whole, the advertisement left little doubt that Samsung meant to depict Vanna White.<sup>90</sup>

### *C. Defenses*

#### 1. Consent

The holder of the right of publicity may consent to the commercial use of their identity.<sup>91</sup> Conduct is not actionable so long as it falls within the boundaries of the consent.<sup>92</sup> A formal agreement, such as an assignment or license may grant consent.<sup>93</sup> In addition, consent may be implied from conduct in states not requiring written consent.<sup>94</sup> Consent may be limited to certain products or media, by duration, or to a specific geographic area.<sup>95</sup>

Consent to be photographed, however, does not automatically imply consent to commercial use.<sup>96</sup> For example, when a photo-journalist takes a picture of a person involved in a public event, implied consent may apply when the picture is used to illustrate the newsworthy event, but not when it is used in an advertisement.<sup>97</sup>

88. *Id.* at 1397-99.

89. *Id.* at 1398.

90. *See id.* at 1399.

91. *Id.*

92. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. f (1995).

93. *Id.*

94. *See id.*

95. *Id.* § 46 cmt. g.

96. *See, e.g.,* *Bi-Rite Enters., Inc. v. Bruce Miner Co., Inc.*, 757 F.2d 440, 446 (1st Cir. 1985); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978) (citing *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952)).

97. *See* 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 10.7[A].

## 2. First Amendment and Newsworthiness

The right of publicity is restricted in the interests of both freedom of expression and freedom of the press. In balancing between these interests, an unauthorized use will fall within one of two categories.<sup>98</sup> A “communicative” use is one in which the policy of free speech outweighs an individual’s right of publicity.<sup>99</sup> In contrast, a “commercial” use is an infringement of an individual’s right of publicity because the commercial aspects of the use outweigh the interests of free speech.<sup>100</sup> Under the First Amendment, media coverage of newsworthy events and matters of public interest is “communicative.” The medium used will often determine whether an unauthorized use is “communicative” or “commercial.”<sup>101</sup> For example, if the likeness is printed on a T-shirt or a coffee mug, the use is considered “commercial” and is not entitled to First Amendment protection. Conversely, if the same likeness is published in the media to illustrate a newsworthy event, the use is considered communicative and remains constitutionally protected.<sup>102</sup>

In *Zacchini v. Scripps*,<sup>103</sup> the issue before the U.S. Supreme Court was whether broadcasting an artist’s entire performance could still be considered news. The Court protected the performer’s right of publicity holding that Scripps’s exhibition of the entire act exceeded the boundaries of news coverage.<sup>104</sup>

In *Montana v. San Jose Mercury News, Inc.*,<sup>105</sup> the *San Jose Mercury News* published a special section in the newspaper about the San Francisco 49ers’ 1990 Super Bowl victory.<sup>106</sup> The special section in the newspaper was entirely devoted to the team.<sup>107</sup> This section included an artistic depiction of Montana.<sup>108</sup> Each of the

98. 4 MCCARTHY ON TRADEMARKS, *supra* note 55, § 28:41.

99. *Id.*

100. *Id.*

101. *Id.*

102. Marya Lenn Yee & Douglas L. Perlman, *Posters Win Free-Press Protections*, NAT’L L.J., July 31, 1995, at B7. For further examples, see Horst-Peter Götting, *From the Right of Privacy to the Right of Publicity*, GRUR INT., 656, 663 (1996); BRUNO SEEMANN, PROMINENZ ALS EIGENTUM 113 et seq. (1996).

103. 433 U.S. 562 (1977); see discussion *supra* Part II.A.

104. *Zacchini*, 433 U.S. at 574–575 (stating that, “[T]he First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.”).

105. 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995).

106. *Id.* at 641.

107. *Id.*

108. *Id.*

newspaper pages was reproduced in poster form and was either sold to the general public or given away at charitable events.<sup>109</sup> Montana brought an action against the newspaper, claiming that the reproduction and sale of the posters constituted common law and statutory commercial misappropriation of his name, photograph, and likeness.<sup>110</sup>

Clearly, the newspaper's publication regarding the Super Bowl was a newsworthy event and was, therefore, entitled to First Amendment protection. But, the crucial issue in the case was whether the reproduction of the picture in poster form was permissible. The court found that the posters enjoyed the same protection as the original newspaper publication of the picture.<sup>111</sup> The court stated that the reason Montana's name and likeness appeared on the posters was for precisely the same reason they appeared on the front page of the original newspaper story, "because Montana was a major player in contemporaneous newsworthy sports event[s]."<sup>112</sup>

However, the court did not extend blanket protection to all commemorative posters.<sup>113</sup> The court focused mainly on the content of the poster and took several factors into consideration: the defendant was a newspaper and not a poster company; the posters were sold at cost or given away; the poster depicted game action and was not a mere portrait of the athlete; and the publication occurred shortly after the event, and was intended to celebrate the event rather than the athlete.<sup>114</sup> Moreover, the court rejected Montana's claims because a newspaper can promote itself through its news stories without violating an individual's right of publicity, as long as the advertising does not create the impression that the person depicted endorses the news medium.<sup>115</sup>

### 3. First Amendment and Parody

The First Amendment generally protects parody.<sup>116</sup> Under copyright law, parody is a permissive fair use of the original work as

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109. *Id.*

110. *Id.*

111. *Montana*, 40 Cal. Rptr. 2d. at 641.

112. *Id.*

113. *Id.*

114. See Yee & Perlman, *supra* note 102, at B9.

115. *Montana*, 40 Cal. Rptr. 2d. at 642.

116. See 5 MCCARTHY ON TRADEMARKS, *supra* note 55, § 31:153.

long as it meets the requirements set forth in section 107 of the Copyright Act of 1976.<sup>117</sup> However, trademark law protects a parody only when there is no likelihood of consumer confusion.<sup>118</sup> It remains unclear whether a parody defense exists when a claim is made under right of publicity.

In *Paulsen v. Personality Posters, Inc.*,<sup>119</sup> the New York Supreme Court recognized the parody defense for a right of publicity claim. In 1968, Pat Paulsen, a well-known comedian, incorporated his presidential candidacy into a comedy routine.<sup>120</sup> His candidacy was the subject of comment by different news media.<sup>121</sup> Paulsen licensed a company to sell his campaign buttons, stickers, and posters.<sup>122</sup> Without Paulsen's consent the defendants sold a mock-presidential campaign poster bearing Paulsen's likeness.<sup>123</sup> The Court denied Paulsen's motion for a preliminary injunction, holding that, "it is sufficiently relevant to a matter of public interest to be a form of expression which is constitutionally protected and 'deserving of substantial freedom.'"<sup>124</sup>

In contrast, the *White* court questioned the existence of a parody defense.<sup>125</sup> The court rejected Samsung's defense that the advertisement was only a "spoof" and held that as commercial speech, the ad did not enjoy the same First Amendment protection.<sup>126</sup> The court distinguished this ad from the ad in *Hustler Magazine v.*

117. 17 U.S.C. § 107 (1976). This provision allows fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. It lists four factors for courts to weigh in determining whether a fair use exists:

- (1) the purpose and the character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.*

118. See *Nike, Inc. v. "Just Did It" Enters.*, 6 F.3d 1225, 1227-28 (7th Cir. 1993); *Schieffelin & Co. v. Jack Co. of Boca, Inc.*, 725 F. Supp. 1314, 1323 (S.D.N.Y. 1989); *Mutual of Omaha Co. v. Novak*, 648 F. Supp. 905, 910 (D. Neb. 1986), *aff'd*, 836 F.2d 397 (8th Cir. 1987); see also 5 MCCARTHY ON TRADEMARKS, *supra* note 55, § 31:153.

119. 299 N.Y.S.2d 501 (S.D.N.Y. 1968).

120. *Id.* at 504.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 508.

125. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 (9th Cir. 1992).

126. *Id.*

*Falwell*.<sup>127</sup> The ad in *Hustler* involved a fictitious interview with Reverend Jerry Falwell, president of the organization "Moral Majority," about his "first time."<sup>128</sup> The Court noted that *Hustler's* parody of Falwell was made for the purpose of poking fun at him whereas the "spoof" of Vanna White and *Wheel of Fortune* was "subservient and only tangentially related to the ad's primary message [to] 'buy Samsung VCRs.'"<sup>129</sup>

The *White* decision has been widely criticized.<sup>130</sup> The decision has raised serious doubts as to whether the underlying rationales of the right of publicity justify the protection of Vanna White's image. The overriding rationale of intellectual property protection is to have the public-at-large benefit from the availability of creative works. This goal is important when deciding whether a celebrity's image should be protected. Judge Kozinski dissented in *White* and questioned the consequences of an expansive right of publicity; "[w]here would we be if every author and celebrity had been given the right to keep people from mocking them or their work? Surely, this would have made the world poorer, not richer, culturally as well as economically."<sup>131</sup>

Another underlying rationale for granting celebrities protection through the right of publicity is to prevent unjust enrichment of the appropriator.<sup>132</sup> However, in the case of parodies, this argument is contestable. Like any other artist, entertainer, or movie star, a parodist has invested time and labor to create a good parody. Any profit the parodist makes is earned.<sup>133</sup> This argument hardly justifies the result in *White*. Vanna White's sole contribution to the game

127. 485 U.S. 46 (1988). *Hustler* featured a "parody" of an advertisement for Campari Liqueur entitled "Jerry Falwell talks about his 'first time.'" *Id.* at 48. Campari's ads included interviews with several celebrities about their "first time," meaning the first time they sampled Campari. *Id.* *Hustler Magazine* copied the layout of these ads and drafted an "interview" with Falwell in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. *Id.* Falwell sued for libel, invasion of privacy, and intentional infliction of emotional distress. *Id.* at 47-48. The U.S. Supreme Court granted First Amendment protection "to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved." *Id.* at 50.

128. *Id.* at 48.

129. *White*, 971 F.2d at 1401.

130. See Pemberton, *supra* note 81, at 107; Clay, *supra* note 81, at 486; Heberer, *supra* note 81, at 748.

131. *White*, 989 F.2d at 1516 (Kozinski, J., dissenting).

132. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983); see also discussion *supra* Part II.A.

133. See Pemberton, *supra* note 81, at 107.

show was as the hostess, she did not create the game show. She was only one part of Samsung's imitation.<sup>134</sup> Samsung exploited the popularity of *Wheel of Fortune*, not Vanna White, and was thus not unjustly enriched through the use of her identity.<sup>135</sup>

In copyright law, when analyzing the applicability of the fair use defense, courts examine whether the parody takes the place of the original; usually, the audience viewing a parody does not have an interest in the original, thus the parody and the original serve different market demand.<sup>136</sup> Therefore, a parody will not affect the market for the original in any significant way and is neither intended nor does it have the effect of replacing the demand for the original.<sup>137</sup> In fact, the parody may even enhance the celebrity's publicity value.<sup>138</sup> As long as the parody is clearly recognizable as such, it will not be a copyright infringement.<sup>139</sup>

In *White*, no consumer would have confused the robot for Vanna White, or assumed that Vanna White endorsed the product. Furthermore, Samsung had no interest in using Vanna White in its commercial. The commercial's humor lay entirely in the fact that the hostess portrayed was a robot. Therefore, Vanna White did not lose any opportunity to use her identity commercially. In a case such as this, the interests of the parodist should prevail. In fact, the essence of a parody is imitation. A parody without imitating the original is not possible. Thus, a conflict between the interests of a celebrity and the parodist is inevitable.

#### D. Transferability of the Right of Publicity

Whereas the right of privacy is considered a personal right,<sup>140</sup> it is uniformly recognized that the right of publicity is a property right.<sup>141</sup> The property nature of the right of publicity is significant in

134. *Id.*

135. *Id.* at 107.

136. *Campbell v. Acuff-Rose Music, Inc.*, 510 U. S. 569, 591 (1994).

137. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964).

138. 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 8.15[B].

139. 1 MCCARTHY ON PUBLICITY, *supra* note 2, § 1.9.

140. See RESTATEMENT (SECOND) OF TORTS § 652I cmt. a (1977); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L.REV. 647, 663 (1991).

141. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988); *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1541 (11th Cir. 1983); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282-83 (D. Minn. 1970); *Presley v. Crowell*, 733 S.W.2d 89, 97 (Tenn. App. 1987); see also CAL. CIV. CODE § 990(b) (West 1997) (stating that, "The rights recognized under



several contexts, including its transferability. The right of publicity may be legally separated from the person<sup>142</sup> and a transfer is possible either by assignment or license.<sup>143</sup>

An assignment of the right of publicity conveys ownership to the assignee. The assignor is bound to the assignment and is prohibited from exploiting these rights if the exploitation conflicts with the terms of the assignment. As discussed above, an assignment is a consent to commercial use of a person's identity. As owner of the right, the assignee has standing to assert the right against others.<sup>144</sup>

In contrast, a license is limited permission to use the right without transfer of any ownership.<sup>145</sup> The parties may limit the license to specific aspects of identity, length of the license, use, territory or product line.<sup>146</sup> There are two forms of licenses which must be distinguished: an exclusive license and a non-exclusive license. The licenses carry significantly different legal implications. A license is exclusive when the licensor explicitly promises not to grant further licenses within the scope of the exclusivity. The licensor may grant several exclusive licenses, if they are limited in scope and do not conflict with one another.<sup>147</sup> Non-exclusive licenses do not contain any promise preventing the licensor from licensing similar rights to other parties.<sup>148</sup>

A licensee does not acquire ownership of the commercial value of the identity, and therefore generally does not have standing to object to uses by third persons.<sup>149</sup> Only when an exclusive license has been granted can a licensee prevent uses that infringe on the scope of their exclusive right.<sup>150</sup> This view has prevailed since the

this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents . . . ."); 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 10.2[A]; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995).

142. *See Post*, *supra* note 140, at 669.

143. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995).

144. *Id.*

145. *Id.*

146. Use outside the scope constitutes an infringement of the right of publicity but not a breach of contract. *Id.* § 46 cmts. a-b.

147. *See* 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 10.13.

148. *Id.*

149. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 96 cmt. g (1995).

150. *See* 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 10.13; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995). The licensor has the option to retain the exclusive right to sue for infringements and to undertake the corresponding duty to monitor the market and

first appearance of the right of publicity in *Haelan*.<sup>151</sup> The baseball players had not granted Haelan any right to sue on their behalf.<sup>152</sup> Therefore, Haelan lacked standing to assert their rights.<sup>153</sup> The court circumvented this problem by holding that the "plaintiff, in its capacity as the exclusive grantee of a player's 'right of publicity,' has a valid claim against the defendant . . ." <sup>154</sup> Subsequent decisions have never questioned this position and have recognized the exclusive licensee's standing to bring a claim.<sup>155</sup>

### E. Descendibility of the Right of Publicity

In the U.S., interests protected by the right of privacy, such as dignity, reputation, or emotions, terminate upon death; traditionally, the right of privacy is a personal right, and heirs cannot sue for a post mortem invasion of the privacy of a deceased person.<sup>156</sup> The right of publicity, however, is a property right that protects the commercial value of a person's identity.<sup>157</sup> Therefore, the rationale for limiting right of privacy to living persons does not apply in the right of publicity cases. Yet, the question whether the right of publicity dies with the person or passes to the descendants or assignees is the

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sue infringers if necessary. *Id.*

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

152. *See id.* at 869.

153. *Id.*

154. *Id.*

155. *See Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1199-1200 (S.D.N.Y. 1983). There the court held:

Unlike privacy rights, which protect personality and feelings and are therefore not assignable, the right of publicity gives rise to a "proprietary" interest in the commercial value of one's persona which is assignable and may be freely licensed. This proprietary interest is much like a copyright; it embodies a bundle of exclusive marketing rights which its holder may transfer in its entirety by an assignment or in part by exclusive licenses. Holders of exclusive licenses gain standing to protect their interests against all who would encroach on the exclusive rights embodied in the licenses.

*Id.*; *see Bi-Rite Enters. v. Bruce Miner Co.*, 757 F.2d 440 (1st Cir. 1985); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977), *aff'd sub nom.*, 579 F.2d 215 (2d Cir. 1978); *Winterland Concessions Co. v. Creative Screen Design, Ltd.*, 214 U.S.P.Q. 188, 190 (N.D. Ill. 1981).

156. RESTATEMENT (SECOND) OF TORTS § 652I cmt. b (1977); *Young v. That Was the Week That Was*, 423 F.2d 265 (6th Cir. 1970); *Flynn v. Higham*, 197 Cal. Rptr. 145, 149 (Cal. Ct. App. 1983); *James v. Screen Gems, Inc.*, 344 P.2d 799, 800-01 (Cal. Ct. App. 1959).

157. *See discussion supra* Part II.B.

subject of numerous academic commentaries<sup>158</sup> and has often been litigated.<sup>159</sup>

The court in *Price v. Hal Roach Studios, Inc.*,<sup>160</sup> first considered the issue of descendibility when the widows of Laurel and Hardy alleged that Hal Roach Studios wrongfully licensed "exclusive merchandising rights" to the names and likenesses of the two renowned comedians. The court ruled in favor of the widows and held that the New York common law right of publicity continued post mortem.<sup>161</sup> The court emphasized the difference in the nature of the right of privacy and the right of publicity. Taking into account the purely commercial nature of the right of publicity the court held that there was "no logical reason to terminate this right upon death of the person protected."<sup>162</sup>

At the same time, a similar claim arose by the heirs of Bela Lugosi.<sup>163</sup> He was the most famous of the many actors who played Count Dracula.<sup>164</sup> Universal Pictures signed a contract with Lugosi which gave them the right to exploit Lugosi's name and likeness in connection with the movie. Universal however licensed the image of Lugosi for use on merchandising products which had almost no relationship to the film itself.<sup>165</sup> Lugosi's heirs claimed that Universal's licensing exceeded the scope of the contract. The court

158. See, e.g., Lee Goldman, *Elvis is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 B.Y.U. L. REV. 597 (1992); Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453 (1981); Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980); Ben C. Adams, *Inheritability of the Right of Publicity upon the Death of the Famous*, 33 VAND. L. REV. 1251 (1980).

159. See, e.g., *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975); *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982); *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 697, 704 (Ga. 1982); *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979). The question of the descendibility of the right of publicity should not be confused with the question of survivability of the cause of action where the invasion of the person's right happened during the person's lifetime. See, e.g., *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Texas 1980). There plaintiff, Heloise, died during the law suit. *Id.* at 535-36. The discussion about the post mortem right of publicity is centered around the instance when the invasion happens after the person's death. See 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 9.2 [A].

160. 400 F. Supp. 836 (S.D.N.Y. 1975).

161. See *id.* at 847.

162. *Id.* at 844.

163. *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979) (per curium).

164. *Id.* at 427.

165. *Id.*

denied the heirs' claim because Lugosi himself had not exploited his image as Dracula during his lifetime.<sup>166</sup>

The requirement of lifetime exploitation was explicitly rejected in *Martin Luther King, Jr. Center. for Social Change, Inc. v. American Heritage Products, Inc.*<sup>167</sup> The case involved the unauthorized sale of plastic busts of the deceased civil rights leader.<sup>168</sup> In *King*, the court recognized the descendibility of the right of publicity.<sup>169</sup> It argued that the economic value of the right may increase during life by securing the expectations of potential licensees and assignees.<sup>170</sup> Regarding the lifetime exploitation requirement, the court observed, "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death as much if not more than a person who exploited his image during life."<sup>171</sup>

The majority of the states currently accept that the right of publicity is descendible property.<sup>172</sup> Ten states recognize a post mortem right by statute and four by common law.<sup>173</sup> None of the statutes recognizing the post mortem right of publicity require prior lifetime exploitation.<sup>174</sup> Courts are also abandoning this requirement.<sup>175</sup> However, statutes, that recognize descendibility, typically limit the duration of the right to a fixed term of years.<sup>176</sup> This varies from twenty to 100 years in most states.<sup>177</sup> It is argued that a limitation of the duration would serve the interest of the general public because at some point, "the person's identity should

166. See *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979). In 1985, California enacted a statutory post mortem right which rejects this lifetime exploitation requirement. CAL. CIV. CODE § 990(h) (West 1997). This provision was designed to legislatively overrule the *Lugosi* decision.

167. *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. American Heritage Prods. Inc.*, 296 S.E.2d 697, 706 (Ga. 1982).

168. *Id.*

169. *Id.*

170. *Id.* at 705.

171. *Id.* at 706.

172. See 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 9.5[B].

173. 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 9.5[A].

174. 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 9.5 (surveying post mortem right to publicity in the U.S.).

175. *Id.*

176. Except for Nebraska, where no duration is defined. See NEBR. REV. STAT. § 20-208 (Michie 1993).

177. See 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 9.5.

enter the public domain as part of history and folklore."<sup>178</sup> A limitation also helps establish commercial predictability and certainty.<sup>179</sup> Assignees and licensees will know how long they can exploit a right. Additionally, they will be able to calculate the exact value in order to avoid unnecessary litigation.

### *F. Remedies*

In the case of a continuing or possible infringement of the right of publicity, the court may grant injunctive relief.<sup>180</sup> A permanent injunction prevents the defendant from unauthorized use of the plaintiff's identity in advertising or merchandising activities. When consent is limited the injunction prevents uses from exceeding the scope of the consent.<sup>181</sup> While trial is pending a court may issue a preliminary injunction. In deciding whether to grant a permanent injunction, courts will consider the following: 1) the likelihood that the plaintiff will suffer irreparable harm, 2) the likelihood of the plaintiff's success on the merits, 3) the balance of equities between the parties, and 4) the interests of society.<sup>182</sup>

A plaintiff may also seek monetary relief in the form of compensatory damages which are measured by the economic loss.<sup>183</sup> If the celebrity has actively exploited their identity, the infringement may result in a direct loss of profits from sales or licenses.<sup>184</sup> Furthermore, unauthorized use can damage a celebrity's image by over exposure or by association with undesirable goods or services.<sup>185</sup> The damage may result in a depreciation of the identity's

178. 2 MCCARTHY ON PUBLICITY, *supra* note 2, § 9.4.

179. *Id.*

180. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4.8 (1995).

181. *See, e.g.,* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 847 (S.D.N.Y. 1975); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970); Brinkley v. Casablanca, 438 N.Y.S.2d 1004, 1014 (N.Y. 1981); Palmer v. Schonhorn Enters., Inc., 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967).

182. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 48 cmt. d (1995); *see e.g.,* Ali v. Playgirl, Inc., 447 F. Supp. 723, 726 (S.D.N.Y. 1978); Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984), *aff'd without opinion*, 488 N.Y.S.2d 943 (N.Y. Sup. Ct. 1985).

183. Some states state a minimum damage recoverable when greater loss is not proven. *See* CAL. CIV. CODE §§ 990, 3344(a) (West 1997) (minimum damage of \$750); NEV. REV. STAT. § 597.810 1(b)(1) (Michie 1994) (minimum damage of \$750); TEX. PROP. CODE ANN. § 26.013 (a)(1) (West 1999) (\$2,500 for an infringement of the post mortem right of publicity).

184. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d (1995).

185. *Id.* § 49 cmt. a.

commercial value and goodwill or may lead to a reduction of future economic opportunities.<sup>186</sup> In *Clark v. Celeb Publishing, Inc.*,<sup>187</sup> a model/actress sought monetary relief for the unauthorized publication of her picture in a low quality pornographic magazine.<sup>188</sup> She claimed that other magazines, such as *Penthouse*, would not want to hire her in the future because of her association with a magazine of such low quality and prestige. The court awarded Clark \$7,000 in compensatory damages for her projected economic loss.<sup>189</sup> A celebrity may also claim restitution for the unjust gain to the defendant.<sup>190</sup>

Courts have had difficulty in assessing damages, especially when determining the exact loss suffered by the plaintiff, or the gain achieved by the defendant. Courts have various means of determining value and take several factors into account including the fame of the celebrity, the amount the plaintiff has received on earlier occasions for similar uses,<sup>191</sup> and expert testimony concerning the licensing fees paid for comparable uses to similarly situated persons. The courts in *Waits*,<sup>192</sup> and *Midler*,<sup>193</sup> found the fair market value of the unauthorized use to be \$100,000 and \$400,000 respectively. In an extraordinary case, the fair market value of a license has reached upwards of \$5.5 million.<sup>194</sup>

In cases where the unauthorized use of the identity has been defamatory or places the celebrity in a false light, the infringement may also cause emotional distress, humiliation or reputational injuries.<sup>195</sup> These damages are governed by an invasion of privacy

186. *Waits v. Frito-Lay, Inc.* 978 F.2d 1093, 1103-04 (9th Cir. 1992); *Clark v. Celeb Publ'g, Inc.*, 530 F. Supp. 979, 984 (S.D.N.Y. 1981); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 138 (Wis. 1979).

187. 530 F. Supp. 979 (S.D.N.Y. 1981).

188. *Id.*

189. *Id.* at 984.

190. See CAL. CIV. CODE § 3344(a) (West 1997); OKLA. STAT. ANN. tit. 12, § 1449(A) (West 1993); TENN. CODE ANN. 47-25-1106(d); TEX. PROP. CODE ANN. § 26.013(a)(2) (West 1999); WIS. STAT. ANN. § 895(1)(b) (West 1997).

191. *Clark*, 530 F. Supp. at 984 (S.D.N.Y. 1981); *Welch v. Mr. Christmas, Inc.*, 454 N.Y.S.2d 971, 973 (N.Y. 1982) (measured by fee under an earlier contract between the parties for an ad running in the previous Christmas season); *Hogan v. A. S. Barnes & Co.*, 114 U.S.P.Q. 314 (Pa.C.P. 1957).

192. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102-03 (9th Cir. 1992).

193. See *Midler v. Young & Republican, Inc.*, Nos. 90-55027, 90-55028, 1991 U.S. App. LEXIS 22641 (9th Cir. Sept. 20, 1991).

194. *Apple Corps Ltd. v. Leber*, 229 U.S.P.Q. 1015, 1016 (Cal. Super. Ct. 1986).

195. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmts. a, b (1995).

and may coexist with the liability for infringement of the right of publicity.<sup>196</sup>

In addition to compensatory damages, punitive damages are available under general tort principles.<sup>197</sup> However, some statutes which recognize the right of publicity authorize the award of punitive damages only when the defendant knowingly infringes on the plaintiff's right of publicity.<sup>198</sup> Punitive damages can be extremely high, as exemplified in *Waits*, where the court awarded \$2 million.<sup>199</sup> The *Waits* court determined that the advertiser and its agency were fully aware of the commercial imitation of Waits's voice.<sup>200</sup> The defendants were aware that voice imitation was actionable in California because *Midler* had been decided only three months earlier.<sup>201</sup> Therefore, the defendants should have known that unauthorized voice imitation was actionable in California.<sup>202</sup>

The Defendants knowingly took a calculated risk, thereby "act[ing] in conscious disregard of rights recognized in California."<sup>203</sup>

### III. THE CONCEPT OF THE "GENERAL RIGHT OF PERSONALITY"

Part II reveals that the right of publicity in the U.S. has developed into a property right separate from the right of privacy. The American right of publicity affords an individual comprehensive protection against unauthorized exploitation of the commercial value of their identity. While an individual in Germany enjoys protection against unauthorized uses of their identity, no distinct right of publicity exists that is comparable to that in the U.S. In Germany, a person's commercial interests are protected by a much broader right, a general right of personality, that has been developed by statute and by the courts.<sup>204</sup>

196. *Id.* § 49 cmt. b (1995).

197. *See Waits*, 978 F.2d at 1105.

198. *See, e.g., Welch*, 454 N.Y.S.2d at 971, 975 (stating that there is no need to establish malice or recklessness); *see* NEV. REV. STAT. ANN. § 597.810 1(b)(2) (Michie 1994).

199. *Waits*, 978 F.2d at 1104.

200. *Id.* at 1104-05.

201. *Id.* at 1104.

202. *Id.* at 1105.

203. *Id.*

204. *See* discussion *infra* Part III.A.

### A. Development

Originally, the authors of the German Civil Code (*BGB-Bürgerliches Gesetzbuch*) rejected the proposal of leading scholars to create a comprehensive right of personality.<sup>205</sup> The legislature decided that only some specific interests should be protected. Specifically, a person's rights were protected under the general provision of the German law of torts and under the right of name.<sup>206</sup> In 1907, the legislature created the "right to one's image" (*Recht am eigenen Bild*) in sections 22 and 23 of the Act of Artistic Creations (*KUG- Kunsturhebergesetz*).<sup>207</sup> In isolated cases, the courts then extended the "right to one's image" to protect other aspects of an individual's personality where the defendant acted *contra bonos mores* (against good morals).<sup>208</sup>

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205. See JÜRGEN SIMON, *DAS ALLGEMEINE PERSÖNLICHKEITSRECHT UND SEINE GEWERBLICHEN ERSCHEINUNGSFORMEN* [THE GENERAL RIGHT OF PERSONALITY AND ITS COMMERCIAL FORMS] 186 et seq. (1981); SEEMANN, *supra* note 102, at 120 et seq.; STEFAN GOTTWALD, *DAS ALLGEMEINE PERSÖNLICHKEITSRECHT* [THE GENERAL RIGHT OF PERSONALITY] 11 (1996).

206. §12 BGB.

207. Whereas the main part of the provisions of this law has been replaced in the copyright law reform by the Law on Copyright and Related Protected Rights of 9 September 1965 (*UrhG-Urhebergesetz*), these particular provisions expressly remain in force. See §141 Nr. 5 *URHG*. Section 22 KUG ("Right to one's image") states:

Pictures or portraits may be distributed or displayed only with the consent of the person portrayed, i.e., the subject. In cases of doubt, consent is considered to have been given if the person portrayed has received a consideration for allowing himself to be portrayed. When the subject dies and for up to 10 years thereafter, the consent of the next of kin is required. Next of kin within the meaning of this law are the surviving spouse and children of the subject and, if neither the spouse nor the children are alive, the parents of the subject.

§ 22 KUG. Section 23 KUG describes the types of pictures that do not require consent:

(1) The following may be distributed or publicly displayed without the required consent according to § 22:

1. Pictures within the realm of contemporary history;
2. Pictures in which the persons appear only incidentally in a landscape or other location;
3. Pictures of meetings, receptions, processions and other gatherings in which the persons portrayed have participated;
4. Pictures that have not been produced by order or request, but whose distribution or display would be in the higher interests of art.

(2) Consent does not however extend to distribution and display in which the legitimate interests of the subject or the next of kin are infringed.

§23 KUG.

208. JÜRGEN HELLE, *BESONDERE PERSÖNLICHKEITSRECHTE IM PRIVATRECHT* [SPECIFIC PERSONALITY RIGHTS IN PRIVATE LAW] 5; see SIMON, *supra* note 205, at 232-39 (listing a survey of these cases).



In 1954, the Federal Supreme Court took the final step in developing an overall protection of personality by recognizing a "general right of personality."<sup>209</sup> The Court stated that the "general right of personality" must be regarded as a constitutionally guaranteed fundamental right based on Articles 1 and 2 of the German Constitution of 1949 (GG- *Grundgesetz*).<sup>210</sup> Furthermore, the court declared that this interest is protected under section 823 I BGB.<sup>211</sup> At the time, the concept of the "general right of personality" was very vague. Today, it still acts as a blanket clause or catch-all<sup>212</sup> for all misappropriation of identity claims, even though the multitude of decisions in this field have given this right more shape.<sup>213</sup> Nevertheless, a general definition of the right has been difficult to develop and the Constitutional Court has never conclusively defined it.<sup>214</sup> Therefore, when determining the scope of the right, courts must consider the particular circumstances of the individual and his personal values on a case-by-case basis.<sup>215</sup>

In principle, all natural persons enjoy the "general right of personality," but it can also protect corporate entities and other organizations.<sup>216</sup> Article 19 III GG states that fundamental rights shall also apply to domestic legal persons to the extent that such rights permit.<sup>217</sup> In the *Carrera* case,<sup>218</sup> the court granted protection to a limited partnership when the defendant depicted the

209. Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] [Supreme Court] 13, 334 'Leserbriefe,' translated in B.S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS 378 (3d ed. 1994).

210. Article 1(1) GG states, "[T]he dignity of a human being is untouchable." Article 2 GG proclaims the right of the individual to freedom and self-determination. These two articles jointly create the "general right of personality."

211. The court regarded the 'general right of personality' as 'other right' within the meaning of § 823 I BGB. See MARKESINIS, *supra* note 209.

212. See KLAUS WASSERBURG, DER SCHUTZ DER PERSÖNLICHKEIT IM RECHT DER MEDIEN [THE PROTECTION OF THE PERSONALITY IN MEDIA LAW] 52 (1988).

213. See cases cited in Part III.

214. See Gregory J. Thwaite & Wolfgang Brehm, *German Privacy and Defamation Law: The Right to Publish in the Shadow of the Right to Human Dignity*, 16 EUROPEAN INTELLECTUAL PROPERTY REVIEW 336, 339 (1994).

215. See Bundesverfassungsgericht Neue Juristische Wochenschrift [BVerfG NJW] 1993, 1463; WASSERBURG, *supra* note 212, at 53.

216. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1981, 2402 'Carrera,' translated in 14 IIC 288, 289 (1983); Oberlandesgericht Karlsruhe Gewerblicher Rechtsschutz und Urheberrecht [OLG GRUR] 1986, 479, 480 'Universitätssiegel;' see Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1994, 1281.

217. See Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1981, 2402 'Carrera,' translated in 14 IIC 288, 289 (1983).

218. BGH NJW 1981, 2402 'Carrera,' translated in 14 IIC 288, 289 (1983).

partnership's name and racing car on toy racing car packages.<sup>219</sup> The Federal Supreme Court recognized that the "general right of personality" is a fundamental right that should also protect legal entities.<sup>220</sup> Thus, the right can protect the personality rights of legal persons within the limits of their intrinsic character and their legally assigned functions.<sup>221</sup>

Today, the "general right of personality" is a bundle of rights that protect different aspects of an individual's personality from unauthorized public exposure. Moreover, it guarantees the protection of human dignity and the right to freely develop one's personality. In addition, several aspects of the "general right of personality" are protected by special statutory provisions.<sup>222</sup> These statutory rights are the "right to one's image" (sections 22 and 23 KUG) and the "right of name" (section 12 BGB). The "general right of personality" only applies when these provisions are not applicable.<sup>223</sup>

### B. Right to One's Image

The "right to one's image" grants individuals the exclusive right to decide to display and distribute their own likeness (*Bildnis*).<sup>224</sup> "Only the person depicted is, as a holder of the right, entitled to decide whether, when and how he wishes to present himself to any third party or the public."<sup>225</sup> The unauthorized public and private distribution of the likeness is prohibited.<sup>226</sup> However, section 23

219. *Id.* at 2402.

220. *Id.*

221. *Id.*

222. Bundesgerichtshof Neue Juristische Wochenschrift Rechtsprechungs Report [BGH NJW-RR] 1987, 231 'Nena,' translated in 19 IIC 271 (1988).

223. The relation between these special personal rights and the 'general right of personality' is controversial. Whereas the dominant opinion considers these statutory rights only as part of the general right, some authors treat them as independent rights. WASSERBURG, *supra* note 212, at 56; HANNIS ARNO MAGOLD, PERSONENMERCHANDISING [PERSONALITY MERCHANDISING] 396 (1994).

224. GERHARD SCHRICKER & EKKEHARD GERSTENBERG, URHEBERRECHT [COPYRIGHT LAW] § 60/ § 22 KUG, no.2 (1987).

225. BGH NJW-RR 1987, 231 'Nena,' translated in IIC 271 (1988).

226. It is important to note that section 22 KUG applies only to the distribution and public display of pictures and portraits, and not to the production or the reproduction of the picture. See SCHRICKER & GERSTENBERG, *supra* note 224, § 60/§ 22 KUG, no. 11. The unauthorized production of the likeness can be an infringement of the "general right of personality." See Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 24, 200 (208) 'Spätheimkehrer,' Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1966, 2353 "Vor unserer

KUG provides an exception for the publication of newsworthy events and likenesses of "persons of contemporary history" (*Personen der Zeitgeschichte*).<sup>227</sup>

### 1. Likeness

In Germany, the concept of likeness is broad. The medium of publication and its form are immaterial; it can be a photograph, photographic layout, drawing, painting, caricature, sculpture, or doll.<sup>228</sup> However, determining whether the depicted person is recognizable is the decisive factor in determining if the use is actionable under section 22 KUG.<sup>229</sup> It is sufficient that a person is recognizable by clothing, hair-style, or gestures.<sup>230</sup> Therefore, a picture of a person's back or a silhouette can also be a likeness, even though the face of the person cannot be seen. For example, in the *Fußballtor* case,<sup>231</sup> an advertisement for a television manufacturer depicted the back of a famous soccer goalkeeper. The Federal Supreme Court held that the goalkeeper was easily recognizable by his particular stature, posture, and haircut. It was not necessary that everyone recognized him, rather it was sufficient that a limited group of persons knew who was depicted.<sup>232</sup> In another case, the Federal Supreme Court in *Nacktaufnahme*<sup>233</sup> had to decide upon facts similar to those in the previously discussed *Nude Back* case.<sup>234</sup> The picture in question showed the back of a nude woman which was recognized by her husband.<sup>235</sup> Like the New York Court of Appeals in the *Nude Back* case, the Federal Supreme Court held that the person could be

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eigenen Tür." The reproduction of the picture is protected by copyright law.

227. See *infra* Part III.B.3.

228. SCHRICKER & GERSTENBERG, *supra* note 224, § 60/§ 22 KUG, no. 4, 7.

229. Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 26, 349 (351) 'Herrenreiter'; WASSERBURG, *supra* note 212, at 75; HELLE, *supra* note 208, at 93.

230. SCHRICKER & GERSTENBERG, *supra* note 224, §60, no.5 /§22 KUG (giving the example of Charlie Chaplin being recognizable by his moustache, bowler hat, and walking-stick).

231. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1979, 2205 'Fußballtor.'

232. *Id.* at 2206.

233. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1974, 1947.

234. Cohen v. Herbal Concepts, Inc., 482 N.Y.S.2d 457 (Ct. App. 1984); see *supra* Part II.B.I.

235. BGH NJW 1974, 1947 'Nacktaufnahme.'

identified and, therefore, should be protected from unauthorized appropriation, even though facial features could not be seen.<sup>236</sup>

Nevertheless, portraits of look-alikes or doubles do not fall within the scope of protection under section 22 KUG. Courts initially considered imitations to be likenesses.<sup>237</sup> However, the current prevailing opinion grants protection on the basis of the "general right of personality."<sup>238</sup>

Further, if the unauthorized use is parodic, subjects of the parody can only seek protection of their likenesses if there is danger of confusion or if the parody amounts to defamation.<sup>239</sup> The *Heino* decision<sup>240</sup> illustrates the attitude toward parody and persiflage. In *Heino*, the lead singer of the punk group, "Tote Hosen" (Dead Pants), imitated a famous folk-music singer known only by his first name, "Heino."<sup>241</sup> The defendant claimed to be the only "true Heino" despite the fact that Heino's extremely light blond hair and dark sunglasses made him easily recognizable to the public.<sup>242</sup> Heino sued and sought injunctive relief.<sup>243</sup> The Regional Court of Düsseldorf held that the imitation was not actionable as long as the public would not mistake the lead singer of the punk group for the folk singer.<sup>244</sup> There was no mistake when the defendant performed on stage that he was the lead singer of a punk group and not a folk

236. *Id.* at 1949.

237. Kammergericht Juristische Wochenschrift [KG JW] 1928, 363 'Piscator.' See Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 26, 52 (67) 'Sherlock Holmes'; Oberlandesgericht Hamburg Neue Juristische Wochenschrift [OLG Hamburg NJW] 1975, 649 (650) 'Aus nichtigem Anlass.'

238. Andreas Freitag, *Die Nachahmung bekannter Persönlichkeiten in der Werbung* [The Imitation of Celebrities in Commercials], *Gewerblicher Rechtsschutz und Urheberrecht* 1994, 345 (346); Joachim Pietzko, *Die Werbung mit dem Doppelgänger eines Prominenten* [The Advertisement with Look-alikes of a Celebrity], *Archiv für Presserecht* [AFP] 1988, 209 (214); SEEMANN, *supra* note 102, at 140; KARL EGBERT WENZEL, DAS RECHT DER WORT- UND BILDBERICHTERSTATTUNG [THE LAW OF REPORTING], *HANDBUCH DES ÄUSSERUNGSRECHTS* [HANDBOOK OF MEDIA LAW] 336 (4th ed. 1994); see SCHRICKER & GERSTENBERG, *supra* note 224, § 60/§ 22 KUG, no. 10; OTTO-FRIEDRICH VON GAMM, URHEBERRECHTSGESETZ [COPYRIGHT LAW] Introduction no. 104 (1968); HORST VON HARTLIEB, *HANDBUCH DES FILM-, FERNSEH- UND VIDEORECHTS* [HANDBOOK OF THE LAW OF FILM, TV AND VIDEO] ch. 26 n.16 (3rd. ed. 1991).

239. In case of defamation there is a violation of the "general right of personality." See SCHRICKER & GERSTENBERG, *supra* note 224, § 60/§ 22 KUG, no. 7.

240. Oberlandesgericht Düsseldorf Neue Juristische Wochenschrift [OLG Düsseldorf NJW] 1987, 1413 'Heino.'

241. *Id.* at 1413.

242. *Id.*

243. *Id.*

244. *Id.* at 1414.

singer.<sup>245</sup> However, advertising posters for the next "Tote Hosen" concert might create the wrong impression that the folk singer was now singing in the punk group.<sup>246</sup> Based upon this reasoning, the court ruled that the posters depicted a likeness, as defined in section 22 KUG, and thus enjoined distribution of the posters.<sup>247</sup>

## 2. Consent of the Portrayed Person

Lawful distribution and public display of a likeness require prior consent of the depicted person.<sup>248</sup> Such consent can be given expressly or implicitly. Courts establish the extent of the authorization by interpreting the individual circumstances surrounding each case.<sup>249</sup> If there is doubt about whether consent was given, consent is presumed when the depicted person has accepted remuneration.<sup>250</sup> Nevertheless, where there is commercial use of a picture, implied consent is difficult to prove because the depicted person must be aware of the particular purpose for which the picture will be used.<sup>251</sup> The general consent to publish given by a celebrity during an interview, for example, does not meet the heightened standard for implied consent unless the celebrity knows that the likeness will be used for advertising. In *Paul Dahlke*,<sup>252</sup> a photographer took a picture of the actor Paul Dahlke sitting on a motorcycle and told Dahlke that the picture was intended for a television program magazine.<sup>253</sup> Instead, the picture was sold to the manufacturer of the motorcycle without Dahlke's permission.<sup>254</sup> The picture was used in an advertisement accompanied by the following text, "Famous man on famous motorcycle."<sup>255</sup> The Federal Supreme Court carefully examined Dahlke's consent regarding the picture and the court took into account the circumstances surrounding when the

245. *Id.*

246. OLG Düsseldorf NJW 1987, 1413 (1414).

247. *Id.* at 1414.

248. § 22 KUG.

249. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1979, 2203 (2204) 'Beckenbauer.'

250. § 22 KUG.

251. See Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1956, 1554 'Paul Dahlke.'

252. BGH NJW 1956, 1554 'Paul Dahlke.'

253. *Id.*

254. *Id.* at 1554.

255. *Id.*

picture was taken.<sup>256</sup> The court concluded that the consent did not encompass the publication of the advertisement because Dahlke had no reason to think that the picture would be used commercially.<sup>257</sup>

In cases of publishing the likeness of a person who has been deceased for less than ten years, the consent of their next of kin is required.<sup>258</sup> The next of kin are the surviving spouse and children of the subject, and if neither the spouse nor the children are alive, then the parents (brothers and sisters are not included) are considered next of kin.<sup>259</sup>

### 3. Picture Within the Realm of Contemporary History

In order to benefit the public, consent is not required if the likeness is considered to be a picture within the realm of contemporary history.<sup>260</sup> The term "contemporary history" covers the political, social, economic, sporting, and cultural life of the nation.<sup>261</sup> Thus, any person who is linked to newsworthy events or matters of public interest from the past, present, or future is regarded as a "person of contemporary history" (*Person der Zeitgeschichte*)<sup>262</sup> and must tolerate distribution of their likeness.

There are two categories of persons—absolute public persons and relative public persons (*absolute und relative Personen der Zeitgeschichte*). Absolute public persons include those permanently bound to contemporary history, such as politicians, members of a royal family,<sup>263</sup> actors,<sup>264</sup> singers,<sup>265</sup> talk show hosts,<sup>266</sup> and athletes.<sup>267</sup>

256. *Id.* at 1554–55.

257. BGH NJW 1956, 1554 'Paul Dahlke.' Likewise, the consent of a hiker to have his photograph taken during a hiking tour does not include the consent to be depicted in a travel brochure. See Oberlandesgericht Frankfurt Gewerblicher Rechtsschutz und Urheberrecht 1986, 614.

258. § 22 KUG.

259. *Id.*

260. § 23 KUG.

261. SCHRICKER & GERSTENBERG, *supra* note 224, § 23 KUG/§ 60, no. 8.

262. SCHRICKER & GERSTENBERG, *supra* note 224, § 23 KUG/§ 60, no. 9.

263. Kammergericht Juristische Wochenschrift [KG JW] 1928, 363 'Piscator'; Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1996, 1128 (1129) 'Caroline von Monaco.' But see Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1996, 985 (986). The Federal Supreme Court did not consider the son of Caroline of Monaco as a "persons of contemporary history" arguing that children of "persons of contemporary history" do not fall within that category unless they fulfill the duties of their parents.

264. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1992, 2084 'Fuchsberger.'

265. BGH NJW-RR 1987, 231 'Nena'; Kammergericht Archiv für Urheber-, Film, Funk-

Conversely, relative public persons are those linked only to a specific event. For example, parties involved in an important trial, or participants in a game or talk show would be considered relative public persons.<sup>268</sup> The likeness of a relative public person can only be published if it has both an actual and recognizable connection to a specific event.<sup>269</sup>

Event coverage is not considered newsworthy unless the display of the likeness satisfies the public's interest in the information.<sup>270</sup> Advertising<sup>271</sup> and merchandising<sup>272</sup> are generally considered commercial interests with public information being of secondary importance. Therefore, advertising and merchandising are generally not considered newsworthy. For example, if a person's picture is used solely to draw the public's attention to a product, German courts generally will not find the use to be in the public's interest. It is irrelevant that the product is of high quality and that the picture itself is unobjectionable.<sup>273</sup>

The following examples illustrate factors the German courts take into consideration when balancing public interest and information with commercial interests. In the *Ligaspieler* decision,<sup>274</sup> the defendant sold portraits of soccer players on trading cards in sealed packages. The Federal Supreme Court denied the applicability of section 23 KUG, noting that the purpose of conveying the information ("*Zweck der Informationsvermittlung*") was secondary.<sup>275</sup> The principal objective was to incite young buyers to collect these pictures and buy more of the product in order to get

und Theaterrecht [KG UFITA] 1981, 163 (164) 'Udo Lindenberg.'

266. Landgericht Köln Archiv für Presserecht 1994, 165.

267. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] [Supreme Court] 1968, 1091 'Ligaspieler'; BGH NJW 1979, 2203 'Beckenbauer'; Oberlandesgericht Frankfurt Zeitschrift für Urheber- und Medienrecht [OLG Frankfurt ZUM] 1988, 248 'Boris Becker.'

268. VON HARTLIEB, *supra* note 238 at ch. 26 n.3.

269. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1965, 2148 'Spielgefährtin' [Playmate].

270. *Id.*

271. Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 74, 308 (312) 'Graf Zeppelin'; BGH NJW 1992, 2084 'Fuchsberger'; Oberlandesgericht Frankfurt Neue Juristische Wochenschrift [OLG Frankfurt NJW] 1966, 254 'Engel in der Leitung.'

272. SCHRICKER & GERSTENBERG, *supra* note 224, § 60/23 KUG, no. 38.

273. BGH NJW 1956, 1554 'Paul Dahlke.'

274. BGH NJW 1968, 1091 'Ligaspieler.'

275. *Id.* at 1092.

the full collection.<sup>276</sup> Accordingly, the court held that the soccer players had a legitimate interest in controlling their commercial exposure and should have the right to benefit from their own popularity.<sup>277</sup> In contrast to *Ligaspieler*, the *Beckenbauer* decision<sup>278</sup> involved the use of a picture of the well-known soccer player, Franz Beckenbauer, on the front page of a soccer calendar. The Federal Supreme Court found that although the publisher might have a commercial interest, it was outweighed by the public's interest in the information.<sup>279</sup> To determine the main purpose of the photograph, the court considered the circumstances surrounding the publication. The court took into account that Beckenbauer was the most famous soccer player at that time, the publication took place shortly after a big soccer event, and the picture was not a portrait, but showed Beckenbauer among other players.<sup>280</sup>

The Regional Court of Appeals of Frankfurt came to a similar conclusion when it considered whether the publication of a picture of Boris Becker on the cover page of a tennis book was lawful.<sup>281</sup> The court found that while the publication of Becker's likeness partly served the commercial interest of the publisher, the interest of the public in the information was prevailing, and Becker's claim was therefore dismissed.<sup>282</sup> The court took into consideration that Becker was an absolute public person of contemporary history—the picture showed him in action during a typical match situation, and the picture was necessary to illustrate the topic, concept, and content of the book.<sup>283</sup> Similarly, in two decisions, *Chris Revue*<sup>284</sup> and *Abschiedsmedaille*,<sup>285</sup> the Federal Supreme Court ruled against protecting a celebrity's right to likeness. In *Chris Revue*, a famous actor was depicted on the cover page of an advertising brochure for a drugstore chain.<sup>286</sup> A short article on the actor appeared inside the

276. *Id.*

277. *Id.*

278. BGH NJW 1979, 2203 'Beckenbauer.'

279. *Id.* at 2204.

280. *Id.* at 2203.

281. OLG Frankfurt ZUM 1988, 248 'Boris Becker.'

282. *Id.* at 249.

283. *Id.*

284. Bundesgerichtshof Wettbewerb In Recht und Praxis [BGH WRP] 1995, 613.

285. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] 1996, 593 'Abschiedsmedaille.'

286. BGH WRP 1995, 613.



brochure.<sup>287</sup> The court stated that freedom of the press outweighs the interest of the individual as long as the reader does not assume that the celebrity endorses the product.<sup>288</sup> *Abschiedsmedaille* involved the deceased chancellor Willy Brandt's head embossed on one side of a medal and some historic data of his life on the other side.<sup>289</sup> Because Brandt's likeness was shown in close connection with his achievements as a politician and statesman, the court found that the informational character of the medal was predominant and did not find Brandt's rights were infringed.<sup>290</sup>

### C. Right of Name

The right of name is governed by section 12 BGB.<sup>291</sup> This right protects a person from the unauthorized use of his name.<sup>292</sup> The two critical issues in a right of name dispute are whether the name is protected and whether use of the name was lawful.

Under the statute, names that identify a person are protected. Therefore, a first name or a pseudonym is protected if it is so closely related to one person that the general public would think of that person when hearing the name.<sup>293</sup> This was the case with the famous German actress, Romy Schneider, who was known as "Romy." The name was used as a title for a movie that had no connection to the actress. The Court of Appeals of Munich held in favor of Schneider, stating that simply mentioning the name "Romy" would evoke memories of the actress in the general public.<sup>294</sup>

287. *Id.* at 613.

288. *Id.* at 614.

289. BGH NJW 1996, 593 'Abschiedsmedaille.'

290. *Id.* at 595.

291. § 12 BGB states:

If the right to the use of a name by a person entitled to it is challenged by another, or if the interest of the person entitled is injured by the fact that another uses the same name without authority, then the person entitled may demand from the other elimination of the infringement. If further infringements are anticipated, he may seek an injunction.

§12 BGB. The protection of § 12 BGB also extends to trade names. This provision is construed very broadly and in practice, has become a general means of protection for the whole law of names and business designations. See Michael Lehmann, *Unfair Use of and Damage to the Reputation of Well-Known Marks Names and Indications of Source in Germany: Some Aspects of Law and Economics*, 17 IIC 746, 747 (1986).

292. *Id.*

293. Bundesgerichtshof Neue Juristische Wochenschrift [BGH NJW] [Supreme Court] 1983, 1184 (1185) 'Uwe.'

294. Oberlandesgerichte München Gewerblicher Rechtsschutz und Urheberrecht [OLG München GRUR] 1960, 394 'Romy.'

Section 12 BGB prohibits the appropriation of a name. Likelihood of confusion is the decisive factor for determining whether there is an illicit use of a name within the meaning of this provision.<sup>295</sup> Whether confusion is likely depends not only on the distinctiveness of the name, but also on the field in which the holder of the name enjoys their particular reputation.<sup>296</sup> In *Romy*, the court explicitly limited the protection of the actress's name to the film industry.<sup>297</sup> For example, the use of the name "Romy" for shoes would be permissible. Misappropriation of a name is also found when mentioning the name creates the impression that a special relationship exists between the holder of the name and the user. In these circumstances, the public is led to believe that the holder has consented to the use of their name and personally endorses the product.<sup>298</sup>

The public use of a person's name is lawful as long as there is no defamation or appropriation. An example of this distinction is found in the *Catarina Valente* decision.<sup>299</sup> A manufacturer of denture fixtures, Kukident, used the name of Catarina Valente, a famous actress, in an advertisement with the following text: "Even though I did not become as famous as my great colleague Catarina Valente, I loved the theatre. One day something awful happened. While I was singing my favorite song, I suddenly lost my teeth. This performance was a horrible humiliation which destroyed my career."<sup>300</sup> The Federal Supreme Court emphasized that merely mentioning the name was not a violation of section 12 BGB because there was no appropriation of the name within the meaning of this provision.<sup>301</sup> However, the court afforded protection on other grounds. It found that the advertisement amounted to defamation and was therefore a violation of the "general right of personality."<sup>302</sup>

295. PALANDT & HEINRICH, KOMMENTAR ZUM BGB [COMMENTARY TO THE BGB] § 12, no. 20 (56th ed. 1997).

296. Christof Krüger, *Right of Privacy, Right of Personality and Commercial Advertising*, 13 IIC 183, 197 (1983).

297. OLG München GRUR 1960, 394.

298. Bundesgerichtshof Neue Juristische Wochenschrift Rechtsprechungs Report [BGH NJW-RR] 1989, 1388.

299. Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ] [Supreme Court] 30, 7 'Catarina Valente.'

300. *Id.* at 8.

301. *Id.* at 9.

302. *Id.* at 13.

Applying this ruling to the Michael Jackson example<sup>303</sup> would result in Michael Jackson not having a valid claim under German law. There, the advertisement did not imply that there was a special relationship between the performer and Coca-Cola, and therefore, a German court would not find a section 12 BGB violation. Moreover, unlike the "Catarina Valente" advertisement, the use of Michael Jackson's name was not defamatory.

#### *D. Other Aspects of Personality*

While the protection of name and likeness is subject to statutory provisions, other aspects of the personality fall within the broader "general right of personality." In the *Heinz Erhardt* case,<sup>304</sup> the son of the famous deceased actor and author, Heinz Erhardt, sought to enjoin a radio advertisement. In the advertisement, an imitator impersonated the actor's voice and made use of terms which were generally recognized as idiosyncrasies unmistakably associated with the deceased Erhardt.<sup>305</sup> The Court of Appeals of Hamburg drew a parallel to protect name and likeness and extended it to protect voice against imitation:

The severity of the infringement of the personality right in this case is no less than in a case of appropriation of a likeness or name. The living memory of Erhardt's artistic personality is evoked for each person who listens to the radio advertisement, regardless of whether or not the imitation is detected. This is the intended effect, for the advertisement draws its commercial value precisely from its provocative and striking effect.<sup>306</sup>

The court, in granting injunctive relief, held that an artist who usually receives remuneration for the unauthorized use of his personality does not have to tolerate imitation.<sup>307</sup>

#### *E. Transferability of the "General Right of Personality"*

In the U.S., the right of publicity is a freely transferable property right, independent of the non-transferable right of

303. See *supra* Part II.B.2.

304. Oberlandesgericht Hamburg Gewerblicher Rechtsschutz und Urheberrecht [OLG Hamburg GRUR] 1989, 666, translated in 21 IIC 881.

305. For questions regarding descendibility, see *infra* Part III.F.

306. OLG Hamburg GRUR 1989, 666.

307. *Id.* at 666.

privacy.<sup>308</sup> However, the German “general right of personality” has always been considered a personal right,<sup>309</sup> and therefore, transfer of ownership is not permissible.<sup>310</sup>

Nevertheless, the “right to one’s image”<sup>311</sup> is currently assumed to have some commercially exploitable value.<sup>312</sup> This assumption is based on the fact that a person has the ability to consent in advance to the use of his personality in exchange for a fee.<sup>313</sup> In practice, this allows the person to grant licenses to others.<sup>314</sup> However, it is still unclear what effects such licenses have and which rights can vest in a licensee.

In *Nena*, the Federal Supreme Court made it clear that the licensee has standing to sue for monetary damages arising out of licensing infringements.<sup>315</sup> *Nena*, a famous German pop singer, assigned all of her commercially exploitable rights, including the right to her image, to the plaintiff, a collecting society.<sup>316</sup> The defendant sold items such as photographs, T-shirts, stationery and photo toothbrushes bearing *Nena*’s likeness without the consent of the collecting society.<sup>317</sup> The collecting society claimed to have the exclusive rights to exploit *Nena*’s likeness and sued for compensation.<sup>318</sup> The Federal Supreme Court held in favor of the plaintiff stating:

At issue here is not the right to an injunction order but the right to recover a fee which plaintiff demands for the commercial exploitation of *Nena*’s likeness. The decision whether to award

308. See *supra* Part II.D-E.

309. See DASCH, DIE EINWILLIGUNG ZUM EINGRIFF IN DAS RECHT AM EIGENEN BILD [CONSENT TO THE INTERFERENCE WITH THE RIGHT TO ONE’S IMAGE] 35 (1990).

310. HELLE, *supra* note 208, at 52; DASCH, *supra* note 309, at 35.

311. See *supra* Part III.B.1.

312. See BGH GRUR 1956, 427 ‘Paul Dahlke’ (regarding the right to one’s image).

313. ANDREAS FREITAG, DIE KOMMERZIALISIERUNG VON DARBIETUNG UND PERSÖNLICHKEIT DES AUSÜBENDEN KÜNSTLERS [THE COMMERCIALIZATION OF THE PERFORMANCE AND PERSONALITY OF THE PERFORMING ARTIST] 162 (1993); GÖTTING, PERSÖNLICHKEITSRECHTE ALS VERMÖGENSRECHTE 142; SEEMANN *supra* note 102, at 165; see Jürgen Ernst-Moll, *Das Recht am eigenen Bildnis - vor und vor allem nach dem Tode* [THE RIGHT TO ONE’S IMAGE BEFORE AND AFTER DEATH] *Gewerblicher Rechtsschutz Und Urheberrecht* 1996, 558 (562).

314. Götting, *supra* note 102, at 142.

315. Bundesgerichtshof Neue Juristische Wochenschrift Rechtsprechungs—Report [BGH NJW-RR] 1987, 231 ‘*Nena*.’

316. *Id.*

317. *Id.*

318. *Id.*

this recovery does not require a decision on the controversial question of whether or not the "right to one's image," due to its legal nature as a general personality right, is transferable. The defendant's use of Nena's likeness gave rise to the plaintiff's right to recover the usual fee for permission to utilize the likeness which is based on section 812 BGB, and does not require that Nena's right in her own likeness had been transferred to the plaintiff.<sup>319</sup>

The ruling in *Nena* has considerably bolstered the rights of licensees by allowing them to recover for monetary damage. However, it is still unclear whether third persons may seek injunctive relief or whether only the exploited person has the right to prohibit others from using his identity.

#### F. Descendibility of the "General Right of Personality"

Just as German law prohibits the transfer of ownership of the "general right of personality," the right is also not descendible.<sup>320</sup> Consequently, a testator cannot make it a part of his estate.<sup>321</sup> But as seen in the *Erhardt* case, section 22 KUG vests limited protection of the decedent's likeness in his next of kin.<sup>322</sup> Consent of the next of kin is required for a period of ten years.<sup>323</sup> During that period, the next of kin have the authority to demand licensing fees and monetary compensation for publication.<sup>324</sup> Thus, even though this right is not inheritable, certain heirs still have the right to market the decedent's likeness. It is important to note that only the surviving wife and children of the person pictured can exercise these rights under the statute.<sup>325</sup> If the person pictured has no surviving wife or child, the parents of the person can exercise these rights.<sup>326</sup>

As far as the other aspects of personality were concerned, the state of the law is not clear. Due to the absence of any specific statutory provision, it was again the task of the Federal Supreme Court to develop rules. The Federal Supreme Court has repeatedly

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319. *Id.* at 231-32.

320. VON GAMM, *supra* note 238, at introduction no. 109; PALANDT & HEINRICH, *supra* note 295, § 1922 no. 43; SEEMANN, *supra* note 102, at 168.

321. *See* SEEMANN, *supra* note 102, at 168.

322. *See supra* Part III.B.2.

323. § 22 KUG.

324. *Id.*

325. *Id.*

326. *Id.*

stated that the legal protection of personality accorded by Article 1 GG does not end at death.<sup>327</sup> The general right to dignity and integrity survives, so that the image of the deceased continues to be protected, at least from gross injuries to his honor and reputation.<sup>328</sup> This right to protection can be claimed by the decedent's next of kin within the meaning of section 22 KUG.<sup>329</sup>

In *Heinz Erhardt*,<sup>330</sup> the court stated that the protection of the "general right of personality" encompasses all continuing use of the artist's work.<sup>331</sup> The court emphasized that life image and life work can hardly be separated from one another in the case of an artist's personality.<sup>332</sup> As a starting point for measuring the scope of protection extending beyond death, the court looked at the extent of the artist's right during his lifetime.<sup>333</sup> In this case, Heinz Erhardt would have been protected during his life against the commercial use of an imitation of his voice.<sup>334</sup> The court explicitly considered the protection of likeness in section 22 KUG, and held that the underlying principles are similar whether it is use of likeness, name, or voice.<sup>335</sup> It would be unacceptable, in light of the German Constitution, if the personality of the artist could be freely imitated immediately after his death.<sup>336</sup> This is true regardless of whether the imitation compromises the dignity and integrity of a person or their heir's right of exploitation.<sup>337</sup> The ruling in *Heinz Erhardt* is significant because the court gave all aspects of personality the same scope of protection after death. Even though the decision only involved injunctive relief, it can also be seen as an extension of the next of kin's right to market the decedent's life image. Thus, the next of kin are in a position to give their consent and waive their right to seek an injunction in exchange for a license fee.

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327. Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] [Supreme Court] 50, 133 (137) 'Mephisto'; Bundesgerichtshof Wettbewerb in Recht und Praxis [BGH WRP] 1984, 681 'Frischzellen-Kosmetik,' translated in 17 IIC 426 (1986).

328. BGH WRP 1984, 681 (682).

329. Ernst-Möll, *supra* note 313, at 563; see also Götting, *supra* note 102, GRUR Int. 1995, 656, 669; SEEMANN, *supra* note 102, at 168 (discussing the descendibility of the "general right of personality").

330. OLG Hamburg GRUR 1989, 666.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. OLG Hamburg GRUR 1989, 666.

337. *Id.*

Whether there is a ten year limit on rights outside of section 22 KUG has yet to be resolved. The *Heinz Erhardt* court did not rule on a time limit issue because the ten year period had not expired at the time of the decision. In *Emil Nolde*,<sup>338</sup> the Federal Supreme Court gave some indication of how long such protection could last.<sup>339</sup> *Nolde* involved two pictures bearing forged signatures of Emil Nolde, the German expressionist.<sup>340</sup> The Federal Supreme Court found that the pictures imitated the style and motifs of Emil Nolde.<sup>341</sup> This, together with the forged signatures, violated his "general right of personality."<sup>342</sup> The Court held the duration of posthumous personal protection depends on the circumstances of each case, and above all, on the renown and significance of the individual's personality.<sup>343</sup> The Court found that protection would not lapse for Emil Nolde until thirty years after his death because of his reputation.<sup>344</sup> Because the infringement in this case occurred approximately thirty years after the painter's death, the Court did not have to rule on whether a longer period of protection would be permissible. This decision shows that posthumous protection can, depending on the circumstances, endure at least as long as thirty years.<sup>345</sup> As long as this protection lasts, the heirs can waive their right to protection and allow commercial use.<sup>346</sup>

### G. Remedies

A celebrity whose "general right of personality" has been violated can seek either injunctive relief or monetary compensation.<sup>347</sup> When monetary compensation is sought, the courts draw a sharp distinction between cases where the person has been

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338. Bundesgerichtshof Gewerblicher Rechtsschutz und Urheberrecht [BGH GRUR] 1995, 668.

339. *Id.* at 671.

340. *Id.* at 668.

341. *Id.* at 670.

342. *Id.*

343. *Id.*

344. BGH GRUR 1995, 668.

345. Götting, *supra* note 102; GRUR Int. 1995, 656 (669) (suggesting a protection of 70 years post mortem); see Heimo Schack, *Das Persönlichkeitsrecht der Urheber und der ausübenden Künstler nach dem Tode* [THE RIGHT OF PERSONALITY OF THE CREATORS AND THE PERFORMING ARTISTS AFTER DEATH], GRUR 1985, 352 (359).

346. See CHRISTIAN SCHERTZ, *MERCHANDISING* 161 (1997); Ernst-Moll, *supra* note 313, at 565-66.

347. This claim would be based on § 1004 BGB.

defamed and cases not involving damage to reputation. Defamation in an advertisement, being a severe infringement of the "general right of personality," gives rise to compensation for pain and suffering as well as for economic loss.<sup>348</sup>

In cases where the likeness, name, or another aspect of the personality has been exploited in commercials without any defamation, plaintiffs can recover for economic loss if they can prove that they lost profits due to an unauthorized use. Alternatively, a court may grant a "fictitious license fee."<sup>349</sup> Similar to copyright infringement cases,<sup>350</sup> courts grant compensation in the amount which would have been paid by the infringing party if it had, in good faith, negotiated a license in advance.<sup>351</sup> Courts derive this remedy from section 812 BGB, which is based on principles of unjust enrichment.<sup>352</sup> A defendant has to relinquish any financial gain he has enjoyed at the celebrity's expense, which is equal to the fee a plaintiff could have reasonably demanded from the defendant for the use of the likeness or name.<sup>353</sup> Courts reason that defendants should not stand in a better position than if they asked for the plaintiff's consent.<sup>354</sup> This right of recovery exists regardless of whether a plaintiff would have permitted the use of their name.<sup>355</sup>

It is important to note that courts will not grant both monetary damages and fictitious license fees.<sup>356</sup> The underlying rationale is that if a plaintiff is awarded a fictitious license fee, the plaintiff will be considered to have closed a licensing or merchandising contract with the tortfeasor.<sup>357</sup> Because consent is granted *ex post facto*, the plaintiff would not be entitled to monetary damages.<sup>358</sup>

348. See BGHZ 26, 349 (358-59).

349. See, e.g., BGH NJW 1956, 1554 (1555) 'Paul Dahlke'; BGH GRUR 1979, 732 (734) 'Fußballtor'; BGH NJW 1981, 2402 (2403) 'Carrera'; BGH NJW-RR 1987, 231 (232); BGH NJW 1992, 2084 (2085) 'Fuchsberger.'

350. Bundesgerichtshof Gewerblicher Rechtsschutz und Urheberrecht [BGH GRUR] 1987, 37 (39) 'Videolizenzvertrag'; BGH 1991 IIC 423.

351. See, e.g., BGH NJW 1956, 1554 (1555) 'Paul Dahlke'; BGH GRUR 1979, 732 (734) 'Fußballtor'; BGH NJW 1981, 2402 (2403) 'Carrera'; BGH NJW-RR 1987, 231 (232); BGH NJW 1992, 2084 (2085) 'Fuchsberger.'

352. BGH NJW 1981, 2402 'Carrera.'

353. *Id.* at 2402; see BGH NJW 1992, 2084 (2085).

354. BGH NJW 1956, 1554 (1555) 'Paul Dahlke'; BGH GRUR 1979, 732 (734) 'Fußballtor'; BGH NJW 1981, 2402 (2403) 'Carrera'; WASSERBURG, *supra* note 212, at 228.

355. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 1926, 349 (352).

356. Krüger, *supra* note 296, at 186.

357. *Id.*

358. *Id.*



In order to determine the amount of the fictitious license fee, the court will only consider expert opinions if it is not familiar with the prices actually paid in the respective area.<sup>359</sup> The damages for defamation and fictitious license fees are usually very low and often do not reflect their true value.<sup>360</sup> This is a typical characteristic of civil damages in Germany, which are generally far less than those in the U.S. For example, the goalkeeper shown from the back in *Fussballtor* received 3,050 DM (approximately 1,700 U.S. dollars).<sup>361</sup> Also, in the case where Nena's likeness had been used commercially on T-shirts and other items, the collecting society to which Nena had assigned all her commercially exploitable rights, received only 5,500 DM (approximately 3,055 U.S. dollars).<sup>362</sup> Moreover, punitive damages are not available in Germany.

#### IV. COMPARISON

The American right of publicity and the German "general right of personality" share some common features and provide a similar scope of protection of a person's identity, even though they are conceptually different. In both Germany and the U.S., likeness is defined broadly. Both court systems, while taking the surrounding circumstances into account, emphasize identification of the person as the decisive factor for protection.<sup>363</sup> In both countries, celebrities enjoy protection against imitation by look-alikes or sound-alikes if the imitation creates the impression that the real celebrity endorses the particular product.<sup>364</sup> A comparison of the holdings in *Heinz Erhardt*<sup>365</sup> and *Midler*<sup>366</sup> or *Waits*<sup>367</sup> demonstrates this similarity. In these cases the courts granted protection where the distinctive voice of an artist was widely known and was deliberately imitated in order to attract attention to a product.<sup>368</sup> The German and U.S. courts would probably reach different decisions in a case where the

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359. WASSERBURG, *supra* note 212, at 228.

360. *See, e.g.*, BGH GRUR 1979, 732 (734) 'Fußballtor'; BGH NJW-RR 1987, 231 (232) 'Nena.'

361. BGH GRUR 1979, 732 (734) 'Fußballtor.'

362. BGH NJW-RR 1987, 231 (232) 'Nena.'

363. *See supra* Parts II.B, III.C.

364. *Id.*

365. OLG Hamburg GRUR 1989, 666.

366. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

367. *Apple Corps Ltd. v. Adriondack Group*, 476 N.Y.2d 716, 718-19 (1983).

368. *See supra* Parts II.B.3, III.D.

prohibited use of a person's name is involved, and the name merely draws attention to the product without implying false endorsement. While the American courts would likely grant protection to the celebrity based on the celebrity's right of publicity,<sup>369</sup> German courts, under the *Catarina Valente* decision,<sup>370</sup> would deny any protection unless the advertisement was defamatory.<sup>371</sup>

Similarities between the two systems are apparent when the courts have to determine whether publication of a person's likeness is newsworthy. In balancing the public's interest in information with an individual's right to protection from exploitation, both systems consider similar criteria. In both Germany and the U.S., the depiction of athletes on trading cards is not permissible without consent.<sup>372</sup> In cases such as these, the prevailing commercial interests are too overriding to allow a newsworthiness defense. However, in *Montana*,<sup>373</sup> as in *Beckenbauer*<sup>374</sup> or *Becker*,<sup>375</sup> the courts dismissed the athlete's claim and held that the distributions of the likenesses were newsworthy given the content of the pictures as well as the timing of their publication.<sup>376</sup> All pictures in these cases depicted game action. They were not mere portraits of the athletes and were published shortly after newsworthy events.<sup>377</sup>

The courts may differ when an advertisement involves a parody of a celebrity. The parody defense has been rejected in *White*,<sup>378</sup> while the *Heino* case shows that German courts are less reluctant to permit the defense.<sup>379</sup> The court pointed out that the imitation of Heino was legitimate as long as it was recognizable as a "spoof."<sup>380</sup> Only if a consumer might think that the picture depicted the original Heino would there be a violation of the "right to one's image."<sup>381</sup> In

369. See *supra* Part II.

370. BGH NJW 1981, 2402.

371. *Id.*

372. See *supra* Parts II.B.1, III.B.1-2.

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

374. BGH NJW 1979, 2203.

375. OLG Frankfurt ZUM 1988, 248.

376. See *supra* Parts II.C.2, III.B.3.

377. *Id.*

378. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1992).

379. OLG Düsseldorf NJW 1987, 1413.

380. *Id.* at 1414.

381. *Id.*

*White*, no consumer would have realistically believed Vanna White endorsed the product.<sup>382</sup>

The major difference between the right of publicity and the "general right of personality" is that the former is a property right,<sup>383</sup> while the latter is a personal right.<sup>384</sup> This distinction makes a difference in the transferability and descendibility of the rights. In Germany, ownership is not transferable or descendible.<sup>385</sup> However, the fact that the person may consent to the publication in exchange for a fee allows the celebrity to license aspects of his or her identity and, consequently, makes the right of personality marketable.<sup>386</sup> Therefore, descendants can control the decedent's image and its commercial use.<sup>387</sup>

The protection a licensee enjoys in Germany is a limited one. Although a licensee can seek monetary damages for infringement, the licensee does not have standing to enjoin third parties from the use of the licensor's identity, even in the case of an exclusive license.<sup>388</sup> Injunctive relief is reserved solely for the celebrity.<sup>389</sup>

As far as monetary compensation is concerned, the outcome of a lawsuit might differ widely even if courts in both countries grant protection. In Germany, compensatory damages are rather low in comparison to what American courts grant.<sup>390</sup> Moreover, punitive damages do not exist in Germany.<sup>391</sup>

The German courts' recent decisions show that courts increasingly recognize that aspects of personality may have some commercial value, and are to some extent marketable.<sup>392</sup> Step by step, the "right to one's image" has moved away from the law of defamation, which does not refer to any commercial aspects, and is

382. *White*, 971 F.2d 1395.

383. *See supra* Part I.

384. *See supra* Part III.E.

385. *See supra* Parts III.E-F.

386. *Id.*

387. *See supra* Part II.F.

388. *See supra* Part III.G.

389. *See supra* Part III.E.

390. *See supra* Part III.G.

391. *Id.*

392. *See* Walter Leisner, *Von der persönlichen Freiheit zum Persönlichkeitsrecht [From Personal Liberty to the Right of Personality]*, BEITRÄGE ZUM SCHUTZ DER PERSÖNLICHKEIT UND IHRER SCHÖPFERISCHEN LEISTUNGEN, FESTSCHRIFT FÜR HEINRICH HUBMANN [CONTRIBUTIONS TO THE PROTECTION OF THE PERSONALITY AND ITS CREATIVE PERFORMANCES] 295, 304 (1985).

turning into a commercially exploitable right.<sup>393</sup> The ability to consent through licenses and the award of fictitious license fees by the courts demonstrate such a development.<sup>394</sup> Thus, German law has moved towards the American approach.<sup>395</sup>

There remain major conceptual differences between the legal nature of the two rights. The German courts still approach the "general right of personality" as a traditional, non-commercial right. German courts do not draw the distinction between a right of privacy, not suitable for commercial exploitation, and a right of publicity, which allows one to control his commercial use. The primary purpose of the German "general right of personality" is not to protect property and commercial values, but to guarantee human dignity and the right of free development of the personality.<sup>396</sup>

The fact that the "general right of personality" is non-transferable limits the possibilities of celebrities to exploit their identities commercially. In the first place, courts are reluctant to award high monetary damages.<sup>397</sup> Moreover, licensees cannot prevent others from unauthorized use.<sup>398</sup> The fact that the right is not descendible also influences the value of the right.<sup>399</sup> As the court in *Martin Luther King, Jr.*<sup>400</sup> noted, the descendibility of the right of publicity enhances the right's value during the celebrity's lifetime and allows the celebrity to profit.<sup>401</sup> In Germany, only the next of kin can consent to use after the celebrity's death.<sup>402</sup> Thus, any licensees are prevented from using the celebrity's image after death.<sup>403</sup> Such restriction makes the transferred right less valuable for the licensee, and consequently for the celebrity during his or her lifetime.

393. See *supra* Parts III.A, III.E-F.

394. See *supra* Parts IV.E-F.

395. See *supra* Part II.A.

396. See Art. 1-2 GG.

397. See *supra* Part III.G.

398. See Part III.E.

399. See *supra* Part III.F.

400. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982); see *supra* Part II.E.

401. See *id.*

402. See *supra* Part III.F.

403. See *supra* Part III.E.

## V. CONCLUSION

In summary, the German courts have not recognized the "general right of personality" as a property right, and probably will not do so in the near future. The "general right of personality" does not protect against unauthorized use of personality so that celebrities can profit. It is merely a remedy to prevent the dissemination of a likeness or an advertising campaign, for example, rather than to provide compensation.

The question of which approach is preferable depends largely on the value one puts on the celebrities' rights over the public interest. It is surely equitable to give celebrities the ability to prevent dissemination of their likenesses or to participate in the gain. This is especially true if the advertisement is of no informational or other social value. The solution the German courts have reached appears to grant the celebrities enough protection. In cases like *White*, it could be argued that the American courts sometimes overextend protection. The compromise the German courts have found seems to be reasonable. When there is no danger of confusion, there is no reason to inhibit such socially enriching activities as parody. After all, one of the underlying rationales of the right of publicity is to further such activities.