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Articles

STAR POWER IN THE LONE STAR STATE: THE RIGHT OF PUBLICITY IN TEXAS

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***124** Since the United States Court of Appeals for the Second Circuit in 1953 in *Haelan Laboratories v. Topps Chewing Gum* coined the term “right of publicity” to describe the right of individuals to control the use of their name and likenesses for commercial and other valuable purposes, more than half the states in the U.S. have granted rights of publicity to individuals through either the common law or by statute. Texas has done both, establishing a right of publicity for living individuals through the common law tort of misappropriation of the name or likeness of another, and providing a right of publicity for deceased individuals under chapter 26 of the Texas Property Code.

Other states, especially California, have expanded the right of publicity to protect not only the literal names and likenesses of individuals, but also distinctive singing voices, catchphrases associated with individuals, nicknames, and other items associated with those individuals. Texas and federal courts have largely relied on these states’ decisions and the Restatement of Torts in defining Texas right of publicity law. This article discusses the elements of a right of publicity claim for both living and deceased individuals under Texas law, as well as issues regarding damages and attorneys’ fees, federal preemption, and sovereign immunity.

In addition to detailing the current state of Texas law, this article suggests that the right of publicity should not be extended to business entities, that courts should be flexible in considering damages claims based on right of publicity violations, and that the right of publicity for the deceased terminates on the fiftieth anniversary of that individual’s death given the Texas Property Code’s clear statement that names or likenesses of individuals may be used for “any purpose” fifty years after that person’s death. Moreover, this article argues that courts applying Texas law should not follow the holding of the Ninth Circuit in *White v. Samsung Electronics America, Inc.*, in which the court held that Vanna White’s “identity” had been appropriated ***125** by Samsung’s use of a robot with a blond wig in an advertisement featuring the “Wheel of Fortune” set, where it could not be argued reasonably that White was endorsing Samsung TVs. Lastly, this article suggests that courts should proceed with caution when analyzing whether commercial uses of photographs of the non-famous are used for the “value” associated with their images.

I. Introduction

In Washington D.C., just days after President Obama’s inauguration, a spokesperson for the new first lady, Michelle Obama, publicly criticizes the makers of Beanie Babies, Ty Inc., for selling dolls that resemble her daughters, Malia and Sasha, and are named “Marvelous Malia” and “Sweet Sasha.”¹ Within days, Ty announces that it is renaming the dolls.²

In Lubbock, Texas, as the fiftieth anniversary of Buddy Holly's death approaches, city officials negotiate with Holly's widow to use his name and image in connection with various city promotions.³ A concert scheduled for the anniversary of Holly's death is canceled so as not to risk a lawsuit from Holly's estate.⁴ The city ultimately agrees to pay Holly's widow \$20,000 over twenty years to continue using Holly's name.⁵ While one might be hard-pressed to find even six degrees of separation between the new first children and a rock 'n' roll icon who died forty some years before they were born, what both of these true stories share are issues related to the "right of publicity."

The right of publicity protects individuals--in most cases, celebrities--from having their names or likenesses appropriated for commercial or other valuable purposes without compensation.⁶ Not surprisingly, much of the right of publicity law in the United States has developed in California and New York, the epicenters for celebrities in this country. While not as active as their colleagues on the coasts, *126 Texas courts have nonetheless developed the law of the right of publicity for living individuals through the tort of misappropriation of name or likeness, and the Texas legislature has granted publicity rights to the heirs of deceased individuals.

Celebrities, including former college football stars, war heroes, and rock stars (both living and dead), have successfully prosecuted right of publicity claims in Texas courts. Moreover, numerous individuals without any sort of widespread fame have brought successful right of publicity claims where their names or likenesses were used for the value those names had to a small segment of society.⁷ No single Texas case or article provides a complete overview of the right of publicity in Texas. But as this article shows, state and federal courts applying Texas law have decided a sufficient number of right of publicity cases to give courts and practitioners guidance regarding the scope and nuances of the right of publicity in Texas. Where gaps have existed, courts have generally turned to the Restatement of Torts and the common law of other states, especially California, to fill those gaps.

The first part of this article discusses the development of the right of publicity in the United States, including the expansion of the right of publicity by some states to protect not only the names and images of individuals, but also voices, nicknames, catchphrases, and other items associated with individuals. The second part of this article discusses the rise of the common law right of publicity for living individuals in Texas. The third part of this article discusses the elements of right of publicity claims in Texas and examines the cases that have expounded upon these elements. It also explores the right of publicity for deceased individuals as established by the Texas legislature in 1987, the availability of actual damages, exemplary damages, and attorneys' fees under Texas right of publicity law, and the relevance of sovereign immunity and federal preemption to Texas right of publicity claims. The final part of this article suggests how several heretofore unanswered questions under Texas right of publicity law should be answered, and at least one way in which Texas law should deviate from some of the decisions applying California law.

II. The Right of Publicity in the United States

A. Origins

The term "right of publicity" was first used in *Haelan Laboratories v. Topps Chewing Gum* by the United States Court of Appeals for the Second Circuit.⁸ In *127 Haelan, an unnamed baseball player had given Haelan the exclusive right to use his image on baseball cards.⁹ Haelan accused Topps of inducing the player to breach the contract by authorizing Topps to use his image on Topps' baseball cards.¹⁰ Topps argued that even if Haelan's allegations were true, the player's contract with Haelan was nothing more than a release from an invasion of privacy claim that Haelan would have faced if it had used the player's image without his permission, and that because the right of privacy is personal, the player's contract with Haelan vested Haelan with no property right that Topps could violate.¹¹ The Second Circuit, applying New York law, disagreed: We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e. the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e. without an accompanying transfer of a business or of anything else. Whether it be labelled [sic] a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in

newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.¹²

Notwithstanding the distinction made by the Haelan court between the right of publicity and the right of privacy, scholars have generally recognized the right of publicity as a subset, or at least a derivative, of the right of privacy.¹³ In 1960, Professor William Prosser identified four distinct torts that protect an individual's right of privacy:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
- *128 2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in false light in the public eye; and
4. Appropriation, for defendant's advantage of the plaintiff's name or likeness.¹⁴

This fourth subset is generally referred to as "the right of publicity" today.¹⁵

Right of publicity law evolved mainly through state law and legal articles for the next few decades,¹⁶ but in 1977, the United States Supreme Court acknowledged the existence of a right of publicity in *Zacchini v. Scripps-Howard Broadcasting Company*.¹⁷ In *Zacchini*, the Supreme Court rejected a First Amendment defense relied upon by a TV station that broadcast the entire act of a "human cannonball" during its news broadcast and was sued by the human cannonball under Ohio law for violating his right of publicity.¹⁸ The court found that "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such [activity] [T]he State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors"¹⁹

B. Beyond Names and Pictures

Since the Haelan court first named the right of publicity, courts, led by those applying California law, have expanded the scope of protection provided by the right of publicity first recognized in Haelan, providing individuals with the power to control not only the use of their names and images for commercial purposes, but also the ability to prevent the use of sound-alike singers, catchphrases, nicknames, and even objects associated with them.

1. Distinctive Singing Voices

In *Midler v. Ford Motor Co.*, the advertising agency that prepared a series of commercials for Ford wanted to use Bette Midler's "Do You Want to Dance" for *129 one of the commercials.²⁰ When Midler's management team rejected a request to use her recording of the song, the agency used one of Midler's former backup singers to record a version of the song and told her to "sound as much as possible" like Midler's recording.²¹ After the commercial was released, a number of individuals told Midler that the recording of the song "sounded exactly" like her.²² Although neither Midler's name nor her image was used in the commercial, the Ninth Circuit held that Midler could maintain a common law right of publicity claim against Ford.²³ "[W]hen a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."²⁴

In *Waits v. Frito-Lay, Inc.*, the Ninth Circuit reaffirmed its holding in *Midler*, rejecting the defendant's argument that *Midler* was no longer good law and that Waits' right of publicity claim was preempted by federal copyright law.²⁵ In *Waits*, Frito-Lay's advertising agency intentionally sought out a Tom Waits sound-alike to sing a commercial jingle that "echoed the rhyming word play" of one of Waits' songs.²⁶ The Ninth Circuit upheld the jury's finding that Frito-Lay's use of a Waits sound-alike constituted a deliberate misappropriation for commercial purposes of a distinctive, widely known voice.²⁷

2. Catchphrases

Celebrities can have the right to prohibit others from using catchphrases or slogans associated with them. In *Carson v. Here's Johnny Portable Toilets, Inc.*, the Sixth Circuit found that Johnny Carson's identity had been misappropriated by a company's

use of Carson's famous Tonight Show introductory phrase "Here's Johnny" on portable toilets.²⁸ "If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used. *130 Carson's identity may be exploited even if his name John W. Carson, or his picture is not used."²⁹

3. Nicknames

The use of recognizable nicknames for celebrities can also give rise to right of publicity claims. In *Hirsch v. S.C. Johnson & Son, Inc.*, for instance, the Wisconsin Supreme Court held that Elroy "Crazylegs" Hirsch, a college and pro football star in the 1940s and 1950s, could maintain a right of publicity claim against S.C. Johnson after it sold a shaving gel called "Crazylegs."³⁰

Muhammad Ali's nickname also played a role in his successful right of publicity claim in *Ali v. Playgirl, Inc.*³¹ In *Ali*, a federal district court in New York found that Muhammad Ali's right of publicity had likely been violated and enjoined Playgirl's publication of a drawing of a nude black man sitting in a boxing ring, where the text accompanying the drawing made reference to "the Greatest," Ali's nickname, and the facial features of the portrait also resembled those of Ali.³²

4. "Identity"

In two cases, the Ninth Circuit has found that under California law celebrities could maintain right of publicity claims where the defendants did not literally use images of the celebrities but used other characteristics associated with those individuals for commercial purposes. In *White v. Samsung Electronics America, Inc.*, Vanna White, the famous letter turner from the game show *Wheel of Fortune*, sued Samsung for its use of a robot dressed with a wig, gown, and jewelry to resemble White in an advertisement designed to showcase the longevity of Samsung televisions.³³ The caption of the ad read, "Longest-running game show. 2012 A.D." and the ad had the robot posed next to the set for *Wheel of Fortune*.³⁴ The creators of the ad referred to it internally as the "Vanna White" ad.³⁵ The Ninth Circuit agreed that the robot was not White's "likeness" and thus affirmed the dismissal of her claim under the California right of publicity statute.³⁶ However, the court held that *131 White could proceed with her claim under California common law that Samsung had appropriated her identity.³⁷

In *Wendt v. Host International, Inc.*, actors George Wendt and John Ratzenberger from the TV show *Cheers* sued the developers of a series of *Cheers*-themed airport bars that included animatronic robots that resembled the actors' "Norm" and "Cliff" characters.³⁸ The actors were able to maintain claims under the California right of publicity statute for the use of their "likenesses" as well as claims under the common law right of publicity for use of their "identities."³⁹

5. Items Associated With an Individual

Items associated with a particular celebrity can also support a right of publicity claim. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the plaintiff was a professional race car driver whose red car had a distinctive white pinstripe and an oval, instead of a circle, as the background for the car's number, "11."⁴⁰ R.J. Reynolds produced a TV commercial that used a photo of Motschenbacher's car, but altered it by adding a spoiler and changing the number to "71."⁴¹ Although Motschenbacher was driving the car in the photo, his facial features were not visible in the ad, which included several comic strip-type "balloons," one of which was touting Winston cigarettes.⁴² The district court dismissed Motschenbacher's right of publicity claim, finding that he was not identifiable in the commercial.⁴³ The Ninth Circuit reversed, finding that the district court's conclusion

that the driver is not identifiable as plaintiff is erroneous in that it wholly fails to attribute proper significance to the distinctive decorations appearing on the car . . . [T]hese markings were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was plaintiff.⁴⁴

*132 6. State-to-State Differences

To date, more than half the states in the United States have recognized a right of publicity either by statute or by common law.⁴⁵ Yet not all states are as generous as California has been in its recognition of protected aspects of identity. New York, for instance, has had a statute proscribing the unauthorized use of a person's "name, portrait or picture" for advertising purposes since 1902.⁴⁶ But New York courts have never recognized a common law right of publicity, and have not extended the statutory coverage to include protection for a celebrity's distinctive voice or personal characteristics, as in *Midler* and

White.⁴⁷ As discussed below, numerous courts examining the right of publicity under Texas law have followed Midler, White, and Motschenbacher, bringing Texas law doctrinally closer to that of California than to that of New York.

III. The Right of Publicity in Texas

A. The Rise of the Right of Publicity in Texas

Although the common law and statutory protection of the right of publicity in Texas is now quite strong, it was not always so. Before the Haelan court coined the term “right of publicity,” the United States Court of Appeals for the Fifth Circuit declined to recognize such a right under Texas law in O’Brien v. Pabst Sales Co.⁴⁸ Davey O’Brien was an All-American quarterback from TCU in 1938.⁴⁹ In 1939, Pabst issued a calendar featuring pictures of O’Brien and other All-Americans along with pictures and logos of Pabst Blue Ribbon beer.⁵⁰ O’Brien sued Pabst for violating his right of privacy.⁵¹ The Fifth Circuit found that “no right of privacy of O’Brien’s had been violated by the mere publishing of his picture and that if any actionable wrong had been done him, it must be found in the fact that the publication impliedly declares that O’Brien was endorsing or recommending *133 the use of Pabst beer . . .”⁵² However, the Fifth Circuit rejected the notion that O’Brien was damaged by the use of his image in conjunction with the beer ads, endorsing the finding of the district court:

[The district court] was of the opinion: that considered from the standpoint merely of an invasion of plaintiff’s right of privacy, no case was made out, because plaintiff was an outstanding national football figure and had completely publicized his name and his pictures. [The district court] was of the opinion too, that considered from the point of view that the calendar damaged him because it falsely, though only impliedly, represented that plaintiff was a user of or was commanding the use of, Pabst beer, no case was made out because nothing in the calendar or football schedule could be reasonably so construed; every fact in it was truthfully stated and there was no representation or suggestion of any kind that O’Brien or any of the other football celebrities whose pictures it showed were beer drinkers or were recommending its drinking to others; the business of making and selling beer is a legitimate and eminently respectable business and people of all walks and views in life, without injury to or reflection upon themselves, drink it, and that any association of O’Brien’s picture with a glass of beer could not possibly disgrace or reflect upon or cause him damage.⁵³

The Fifth Circuit went on to hold that O’Brien’s claim that his right of privacy was violated failed because “the publicity he got was only that which he had been constantly seeking and receiving . . . and there were no statements or representations made in connection with it, which were or could be either false, erroneous or damaging.”⁵⁴

Though O’Brien could be characterized as an early rejection of the right of publicity under Texas law, the court’s dismissal of O’Brien’s claim seems to have been caused more by how his case was pleaded than by hostility toward allowing individuals to control the use of their names or images for commercial purposes. According to the Fifth Circuit:

The case [pledaded by O’Brien] was not for the value of plaintiff’s name in advertising a product but for damages by way of injury to him in using his name in advertising beer. Throughout the pleadings, the record and the brief, plaintiff has uniformly taken the position that he is not suing for the reasonable value of his endorsement of beer, on the contrary, the whole burden of his pleading and brief is the repeated asseveration, that he would not and did not endorse beer, and the complaint is that he was damaged by the invasion of his privacy in so using his picture as to create the impression that he was endorsing beer.⁵⁵

*134 The majority in O’Brien rejected the dissenting opinion by Judge Edwin Holmes that “under the Texas common law, the appellant is entitled to recover the reasonable value of the use in trade and commerce of his picture for advertisement purposes.”⁵⁶ Judge Holmes recognized that “[t]he right of privacy is distinct from the right to use one’s name or picture for purposes of commercial advertisement.”⁵⁷ Yet, because O’Brien had pleaded his injury as one resulting from his privacy being violated as a result of being associated with the evils of beer, instead of as a claim for the value of his endorsement, the majority was unwilling to join with Judge Holmes’ opinion and the Fifth Circuit missed an opportunity to define an as-yet-unnamed right of publicity under Texas law.⁵⁸

A decade later, the Texas Court of Appeals in Waco recognized in *U.S. Life Insurance Co. v. Hamilton* that the unauthorized “use of an individual’s signature for business purposes unquestionably constitutes the exercise of a valuable right of property.”⁵⁹ In *Hamilton*, the plaintiff had been an employee of an insurance agency.⁶⁰ Two weeks after his employment contract was terminated, his former employer sent a letter to 200 individuals under the plaintiff’s signature promoting an insurance plan.⁶¹ *Hamilton* sued his former employer for “compensatory damages on account of the unauthorized use of his signature and name by appellants in the promotion of their business.”⁶² The court distinguished *Hamilton*’s claim from cases such as *O’Brien* that sought recovery for an invasion of privacy:⁶³

There was no pleading or admission that appellee’s privacy or his desire or right to be let alone . . . was violated in this cause. The gravamen of the misconduct of which appellee complained . . . was the act of appellants in continuing to use his name and signature for the promotion of their business after their pre-existing right and authority to do so had ended. The use of an individual’s signature for business purposes unquestionably constitutes the exercise of a valuable right of property in the broadest sense of that term. It thus appears to us that appellee’s complaint was based upon an infringement against his right or property in and to the exclusive use of his signature after his contract of employment with appellants had been terminated, irrespective of the question of privacy as an independent *135 ground of recovery. In this broad sense, we have no doubt that the unauthorized use of appellee’s name and signature by appellants, regardless of why it was so used, constituted such wrongful conduct on their part as to entitle appellee to the recovery of nominal damages, even though no actual damages were shown.⁶⁴

Thus, like *Haelan* a few years later, the *Hamilton* court distinguished the right to the commercial exploitation of one’s identity, later labeled the right of publicity, from the right to privacy. Despite apparently being the first Texas case to recognize a right of publicity, *Hamilton* has been largely overlooked by Texas courts since.

In 1973, the Texas Supreme Court laid the groundwork for subsequent Texas right of publicity cases when it held in *Billings v. Atkinson* that under Texas law, “an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted.”⁶⁵ Shortly after the *Billings* decision, John Kimbrough, a former college football star from Texas A&M, did not make the same pleading mistake made by *Davey O’Brien*.⁶⁶ In *Kimbrough v. Coca-Cola/USA*, Kimbrough sued Coca-Cola after his picture was included without his consent as part of a Coke advertisement in a program for an SMU-Wake Forest football game.⁶⁷

The Texas Court of Civil Appeals in Eastland considered “whether a public person in Texas has a right of privacy against the unauthorized use of his name or picture for commercial purposes.”⁶⁸ Coca-Cola relied upon *O’Brien* and argued that because Kimbrough was a public person, he had no cause of action for violation of any proprietary right or right of privacy.⁶⁹ The Kimbrough court distinguished *O’Brien*, observing that *O’Brien* had claimed he had been injured because of the association with beer, not for the “unauthorized appropriation and use of his name and likeness in an advertising program” for which Kimbrough sought relief.⁷⁰ Relying upon *Billings*, as well as cases from other states finding a cause of action for unauthorized use of one’s name or picture for commercial purposes,⁷¹ the Kimbrough *136 court found that Kimbrough had pleaded a claim for unauthorized appropriation of his name and likeness by Coca-Cola.⁷² Since the Kimbrough decision in 1975, there has been little doubt about the existence of a right of publicity in Texas.

B. The Right of Publicity for Living Individuals in Texas Today

Today in Texas, the right of publicity for living individuals is protected through the tort of misappropriation of the name or likeness of another. The misappropriation tort has three elements:

- (1) The defendant appropriated the plaintiff’s name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose;
- (2) The plaintiff can be identified from the publication; and
- (3) There was some advantage or benefit to the defendant.⁷³

The Fifth Circuit has stated that “Texas courts rely on the Restatement [of Torts] as the ‘definitive source of guidance in cases involving invasion of the right of privacy.’”⁷⁴ Section 652C of the Restatement states: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability for invasion of his privacy.”⁷⁵ Comment a to section 652C further provides that “[t]he interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of

benefit to him or to others.”⁷⁶ The other comments, discussed below, further expand upon various nuances of right of publicity law.⁷⁷

***137 1. Use of an Individual’s Name or Likeness for the Value Associated With It, but Not for an Incidental or Newsworthy Purpose**

i) Use of an Individual’s Name or Likeness

When an individual’s name or photograph is used to advertise a product without his or her permission, Texas courts routinely find that the first element of a right of publicity claim has been met. For instance, in *National Bank of Commerce v. Shaklee Corp.*, the writer of *Hints from Heloise* sued Shaklee, which had purchased 100,000 copies of one of Heloise’s books for sale by its distributors, for using Heloise’s name and photograph in connection with a Shaklee advertising campaign and altering the books to include advertisements linking Shaklee and Heloise.⁷⁸ The United States District Court for the Western District of Texas found that Shaklee had appropriated Heloise’s image by using phrases such as “Welcome a new Shaklee Woman, Heloise” and “Heloise and Shaklee all around the house just naturally make your day easier.”⁷⁹

In *Elvis Presley Enterprises, Inc. v. Capece*, the company owning Elvis Presley’s post-mortem publicity rights sued the owner of a bar called “The Velvet Elvis” for its various uses of Elvis’s name and images on the inside of the bar and in its marketing activities.⁸⁰ The United States District Court for the Southern District of Texas found that “[u]nquestionably, the use of pictures or images of Elvis in ‘The Velvet Elvis’ advertisements is an unlawful appropriation of the identity of Elvis Presley.”⁸¹

In addition to finding that individuals’ images and names are protected by the right of publicity, courts applying Texas law have shown a willingness to expand the meaning of “likeness” to cover things intended to evoke the identity of an individual for commercial or other valuable purposes. This is consistent with the Restatement (Third) of Unfair Competition’s position that in addition to names and likenesses, “other indicia of identity are protected by the right of publicity.”⁸²

***138** In *Henley v. Dillard Department Stores*, Dillard Department Stores ran a newspaper ad for a shirt known as a “henley.”⁸³ The ad portrayed a picture of a man wearing the shirt along with the words “This is Don,” and an arrow pointing to the shirt with the caption, “This is Don’s henley.”⁸⁴ The ad attracted the attention of musician Don Henley of the Eagles, who sued Dillard for, *inter alia*, invasion of his right of publicity, and ultimately moved for summary judgment on that claim.⁸⁵ Although the United States District Court for the Northern District of Texas found that an issue of fact existed as to whether “Don’s henley” was literally the “name” of Don Henley, the court found that there was no question that “Don’s henley” was recognizable as the “likeness” of Don Henley.⁸⁶ The court cited White, Carson, Motschenbacher, Ali, and Hirsch in holding: “Because the use of the expression ‘Don’s henley’ is so clearly recognizable as a likeness of Plaintiff, the Court finds that no reasonable juror could conclude that the phrase ‘Don’s henley’ does not clearly identify the Plaintiff, Don Henley.”⁸⁷

In *Elvis Presley Enterprises*, the court found that The Velvet Elvis’s “mention of Graceland or use of phrases in ads that are linked inextricably to the identity of Elvis as a celebrity, such as ‘Elvis has left the building’ is . . . violative of [Elvis’s] publicity rights.”⁸⁸ It added that “[a] celebrity’s identity can be appropriated unlawfully even without use of his name or likeness.”⁸⁹

***139** But not everything that could be associated with an individual constitutes that individual’s likeness. In *Matthews v. Wozencraft*, former undercover narcotics officer Creig Matthews sued the author, publishers, and producers of the book and movie *Rush* for misappropriation and invasion of privacy because of their use of a fictionalized version of Matthews’s life story in the book and movie.⁹⁰ Although the Fifth Circuit acknowledged that the term “likeness” could include things such as the use of a singer’s distinctive voice,⁹¹ “[t]he term ‘likeness’ does not include general incidents from a person’s life, especially when fictionalized.”⁹² The court found that retelling Matthews’ story did not reduce the value of his name, like advertisers using a celebrity’s name for endorsement purposes, but rather increased the value of his story, as evidenced by extensive media coverage of the movie and the individuals behind the true story on which it was based.⁹³ The court also found that even if Texas recognized a cause of action for misappropriation of events in one’s life, Matthews’ claims likely would have failed because of the exception for biographies,⁹⁴ First Amendment or Texas constitutional grounds,⁹⁵ or because Matthews’ story was in the public domain, due to his giving of interviews, publication of his own book, and news coverage

of his trial testimony.⁹⁶

Thus, while Texas law protects individuals from the use of things that are associated with them other than their name or images, such protection is not unlimited, as Matthews makes clear.

ii) Use for the Value Associated with That Name or Likeness

Not all uses of an individual's name or likeness give rise to a right of publicity claim. To be actionable, the name or likeness must be used for the value associated with that name or likeness. Some cases considering this element have treated *140 it as requiring a use of someone's persona for its commercial value.⁹⁷ According to the comments to section 652C of the Restatement (Second) of Torts, however, the value garnered from use of an individual's name or likeness need not be a commercial value:

How invaded. The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.⁹⁸

Because the right of publicity for living individuals exists in Texas as a result of common law rather than statutory law, Texas courts should not limit right of publicity claims to situations in which an individual's name or likeness is used for commercial purposes.⁹⁹ Examples of noncommercial uses that could support a right of publicity claim given by the Restatement include an individual falsely representing that they are the spouse of another individual or falsely representing that an individual supports a bill that that individual actually finds objectionable.¹⁰⁰ “[T]he defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness.”¹⁰¹ Generally speaking, an exploitation of the “value” of someone's name or likeness is easiest to find when that individual has preexisting widespread fame, but in appropriate circumstances, even those with notoriety to a portion of society can sustain right of publicity claims if their names or images are used for the value associated with them.

a) Value As a Result of Widespread Fame

The court in O'Grady v. Twentieth Century Fox Film Corp. found that there was a question of fact regarding whether the defendant had used the plaintiff's *141 name for the value associated with it when a documentary about the plaintiff was closely paired with promotions for a fictionalized account of the plaintiff's experiences.¹⁰² Scott O'Grady was a United States Air Force pilot who was shot down over Bosnia in 1995, an event extensively covered by the American media.¹⁰³ After six days behind enemy lines, O'Grady was rescued.¹⁰⁴ He later wrote two books and gave speeches about his experience, which became his primary source of income.¹⁰⁵ In 1996, O'Grady gave extended interviews to the BBC, which the BBC turned into a documentary called Missing in Action.¹⁰⁶ The documentary was later licensed to Discovery Communications, Inc., which renamed the documentary Behind Enemy Lines: The Scott O'Grady Story and broadcast it 34 times on the Discovery Channel between 1997 and 2001.¹⁰⁷

In November 2001, Fox released the movie Behind Enemy Lines, which the movie's producer conceded was inspired by and loosely based on O'Grady's experience in Bosnia as reported by news broadcasts.¹⁰⁸ Discovery proposed to Fox a “stunt night” that would intertwine materials from the documentary with promotional material for the Behind Enemy Lines movie during a broadcast of the documentary on Discovery.¹⁰⁹ On November 28, 2001, Discovery broadcast the documentary with a total of nine segments related to the fictionalized Behind Enemy Lines before and during the documentary.¹¹⁰ For instance, during the broadcast of the documentary, Discovery also broadcast interviews with the actors from the movie and made statements such as “[i]n the New Twentieth Century Fox Feature Film, Behind Enemy Lines, like Scott O'Grady, Owen Wilson's character, naval aviator Chris Burnett, runs into some challenges once his plane is shot down.”¹¹¹ *142 Leading up to the “stunt night,” Discovery also broadcast several promotional spots tying the documentary to the movie.¹¹²

O'Grady sued Fox and Discovery for, *inter alia*, misappropriation of his name, likeness, and identity.¹¹³ In response to Discovery's motion for summary judgment, the court ruled that there was a genuine issue of material fact as to whether the November 28 broadcast and related promotions for the movie capitalized upon the commercial value associated with

O'Grady's name, likeness, and image.¹¹⁴

In Henley, the court also found that Dillard's use of "Don's henley" was a use of Don Henley's name for the value associated with it.¹¹⁵ The creators of the advertisement testified that the use of "Don's henley" was a wordplay on Henley's name intended to make the ad more interesting and that they hoped it would catch the reader's eye because of its similarity to "Don Henley."¹¹⁶ Thus, where a plaintiff has achieved widespread fame to the public at large, Texas courts are readily inclined to find that uses of that individual's name or likeness was for the "value" associated with it.

b) Value to a Narrow Segment of Society

Although an individual's name or likeness must be used for the value associated with it in order to support a misappropriation claim, that individual need not be well known to the public at large if the use made of their name or likeness has value to those targeted by its use.¹¹⁷ In *Moore v. Big Picture Co.*, Moore worked for Southwest Films, a company that provided audio-visual services to Kelly Air Force *143 Base near San Antonio.¹¹⁸ As the expiration of Southwest's contract with Kelly approached, Kelly requested bids from other audio-video providers.¹¹⁹ As part of the contract award process, Big Picture made a presentation to several government compliance officers, during which it distributed a proposed staffing chart, in which Moore was included.¹²⁰ In addition, there was testimony that representatives from Big Picture may have told the government officers that Moore had accepted a position with them.¹²¹ Big Picture was awarded the contract, and after the termination of Southwest's contract, Moore was unable to obtain employment in the audio-visual industry due to, as Moore claimed, statements made about him by Big Picture.¹²² Moore sued for, *inter alia*, misappropriation of his name and the jury found for him on that claim.¹²³ On appeal, Big Picture argued that "Moore failed to establish that his name had any value or special significance to Big Picture or that Big Picture realized any commercial advantage as a result of the unauthorized use of Moore's name."¹²⁴ A representative of the Air Force testified that the fact that Moore's name was used on the staffing chart did not affect the decision to award the contract to Big Picture.¹²⁵ Yet the president of Big Picture testified that Moore was considered to be a good worker whom Big Picture had tried to hire, and the audio-visual manager at the base stated that he was familiar with Moore's work, that Moore's name had value to him, and that Big Picture would not have met the contract requirements without a qualified media coordinator.¹²⁶ While the Fifth Circuit thought it was an overstatement by Moore that Big Picture would not have been hired without him, "the evidence certainly suggests that it was to appellant's advantage to have a well-known, highly qualified person listed on the proposed staffing chart."¹²⁷ Accordingly, the Fifth Circuit upheld the jury's verdict.¹²⁸

In *Topheavy Studios, Inc. v. Doe*, the plaintiff sued the producers of The Guy Game for using her topless image as part of a computer trivia game that rewards *144 players for correct answers by showing them pictures of topless women.¹²⁹ Plaintiff had been a minor when she attended spring break at South Padre Island in 2003.¹³⁰ While she was there, she was asked by the producers of The Guy Game to participate in a trivia contest on a public stage for which she would receive money if she answered correctly but would be asked to expose her breasts if she answered incorrectly.¹³¹ She signed a release form with a false name and other false information, and used a fake I.D. to prove that she was over the age of eighteen.¹³² While on stage, the plaintiff exposed her breasts to the crowd at least three times and received \$20 in "prize money."¹³³

The Guy Game was released for sale in 2004, and shortly thereafter the plaintiff was informed by her brother that the game contained multiple images of her exposing her breasts.¹³⁴ The plaintiff also discovered that her likeness was being used on the Internet to market the game.¹³⁵ She sued the game producers for, *inter alia*, misappropriation of her likeness.¹³⁶ The trial court issued a temporary injunction preventing any further distribution of the game, and the producers filed an accelerated interlocutory appeal.¹³⁷

The court found that the plaintiff had put forth evidence as to each of the elements of an invasion of privacy by misappropriation of likeness claim.¹³⁸ "Liability for such an invasion of privacy will arise if the defendant appropriates, for its own benefit, the commercial standing, reputation, or other values associated with the plaintiff's likeness."¹³⁹ Citing the Restatement (Second) of Torts, the court observed that "[g]enerally, an appropriation becomes actionable when the name or likeness is used 'to advertise the defendant's business or product, or for some similar *145 purpose.'"¹⁴⁰ Accordingly, the Austin Court of Appeals affirmed the trial court's preliminary injunction.¹⁴¹ The court of appeals did not indicate whether it relied upon the use of the plaintiff's image in the game, in the advertising for the game, or both, in finding that there had been an appropriation of the plaintiff's image.

The Topheavy plaintiff was not a typical right of publicity plaintiff. Unlike the plaintiffs in O'Grady and Henley, the unwilling participant in The Guy Game was not a celebrity, nor was she someone whose name had value to a narrow segment

of the population, like the plaintiff in Moore. Her image had no apparent value to its use beyond the fact that she was presumably attractive, albeit anonymous to most of the public, and ultimately topless in the game, which was an important selling feature for the game. But though her image had value for atypical reasons, the Austin Court of Appeals did follow the letter of the law in finding that her image was used for the value associated with it, at least insofar as it was used to promote the game.¹⁴²

But the use of nude images of a non-famous individual does not always support a right of publicity claim under Texas law. In Falloona v. Hustler Magazine, Inc., the plaintiffs were not successful in their misappropriation of likeness claim where their images had not been used to promote the sale of a product.¹⁴³ In Falloona, the plaintiffs had nude pictures taken of them when they were between four and seven years old.¹⁴⁴ With their parents' permission, the photos had appeared in a book called The Sex Atlas.¹⁴⁵ Later, the photographs were printed, with the approval of The Sex Atlas' publisher, in Hustler Magazine as part of a review of The Sex Atlas in the November 1978 issue of Hustler, and as part of a book excerpt in the December 1978 issue.¹⁴⁶ The United States District Court for the Northern District of Texas granted summary judgment against the plaintiffs on their misappropriation of likeness claim, which it referred to as a "commercial appropriation" claim.¹⁴⁷ The court found, *inter alia*, that Hustler did not capitalize upon the likeness *146 of the plaintiffs in order to sell more magazines because the pictures were not included in a publicity campaign designed to sell more magazines.¹⁴⁸

In Matthews, the Fifth Circuit found that fictionalizing events that had happened to the plaintiff did not amount to using the name or likeness of the plaintiff for the value associated with it.¹⁴⁹ The defendants had not "cashed in" on the goodwill associated with Matthews' name by producing a novel and movie about events in which he participated, even if some people could associate him with the fictional "Jim Raynor" character portrayed in *Rush*.¹⁵⁰ "The use of his name does not provide value to the book, nor is [the author] using his name to 'endorse' the book to the public, because his name has no independent value."¹⁵¹ Thus, unlike *Topheavy*, Matthews's name did not add value to the story of his life the same way that topless images of the *Topheavy* plaintiff added value to an otherwise nominally valuable image of the plaintiff.

c) Attempts to Damage or Parody a Name or Likeness Are Not Uses for Value

Efforts to damage a party's name, as opposed to trying to benefit from the use of that name, will not support a right of publicity claim. In *Express One International, Inc. v. Steinbeck*, the pilots of Express One, a freight and charter passenger airline, had voted in 1998 to unionize.¹⁵² During the course of the union campaign, Steinbeck, a former pilot for Express One, posted a message on an Internet message board under the screen name "ExpressONE" threatening union supporters who had posted messages in support of unionization.¹⁵³ After the pilots voted in favor of unionization, Express One discovered that Steinbeck had posted the anti-union message. *147¹⁵⁴ Express One sued Steinbeck for, *inter alia*, invasion of privacy, based on the alleged misappropriation by Steinbeck of its name.¹⁵⁵ The trial court granted summary judgment for Steinbeck on all of Express One's claims.¹⁵⁶

The Dallas Court of Appeals affirmed.¹⁵⁷ The court noted that there is no Texas authority granting corporations a right of privacy.¹⁵⁸ But the court did not decide whether corporations had such a right, because it concluded that Express One had produced no evidence to support its cause of action because it did not show that Steinbeck had used its name "because of any value associated with the name."¹⁵⁹

Express One made no showing that Steinbeck used the name because he wished to appropriate its commercial or reputational value. Indeed, there is no evidence that Steinbeck intended to receive any benefit at all as a result of his using the name. The evidence produced by Express One simply implied that Steinbeck intended to impugn Express One's reputation, rather than appropriate it.¹⁶⁰

Accordingly, the dismissal of Express One's claim for misappropriation of its name was affirmed.¹⁶¹

The use of someone's name or image for the purpose of parody is also unlikely to support a right of publicity claim. In *Busch v. Viacom International, Inc.*, the plaintiff was a bodybuilder who had appeared with television evangelist Pat Robertson on an episode of *The 700 Club* to talk about his weight loss.¹⁶² The weight loss was a result of following a weight loss program detailed on the show and using *148 a diet shake, "Pat's Great Tasting Diet Shake," developed by Robertson.¹⁶³ In October 2005, *The Daily Show with John Stewart* on Comedy Central aired a fake endorsement of Pat's diet shake, which included segments from GNC's television commercial for the product, commentary from a Daily Show correspondent, and a clip from *The 700 Club* that showed Robertson shaking hands with plaintiff and exclaiming "thanks for using the shake!"¹⁶⁴ The plaintiff sued, *inter alia*, Viacom, the owner of Comedy Central, for defamation and misappropriation of his image.¹⁶⁵ The

District Court for the Northern District of Texas dismissed Busch's claim because his image was in the public domain after he had voluntarily appeared on The 700 Club to discuss his use of the shake.¹⁶⁶ In dicta, the court indicated that an alternative ground for dismissal would have been that the plaintiff had "failed to allege that Viacom appropriated his image for its commercial value."¹⁶⁷

As Viacom correctly argues, "Plaintiff has failed to allege that there is anything unique or valuable about his likeness that [Viacom] appropriated for commercial benefit." . . . Plaintiff himself alleges that the challenged segment was a "fake promotion." . . . A "fake promotion" of Pat's Diet Shake simply cannot be squared with Plaintiff's conclusory allegation that Viacom used his image to promote Pat's Diet Shake on The Daily Show.¹⁶⁸

While the Viacom court may have been unduly restrictive in implying that Busch needed to show that Viacom had received a "commercial" benefit from the use of his image, the court correctly concluded that a "fake promotion" incorporating Busch's image was not a use of that image for the value associated with it. If anything, the comedy bit used Pat Robertson's image for the comedic value associated with it.

*149 iii) Incidental Uses

A use of an individual's name or likeness will not support a right of publicity claim if the use is merely incidental. According to the Restatement (Second) of Torts:

Incidental use of name or likeness. The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes.¹⁶⁹

In Benavidez v. Anheuser Busch, Inc., the Fifth Circuit found that an incidental benefit to the defendant was insufficient to support a right of publicity claim.¹⁷⁰ In Benavidez, a subsidiary of Anheuser-Busch had created a documentary about Hispanic Congressional Medal of Honor recipients at the request of the National Association of Latino Elected and Appointed Officials.¹⁷¹ The thirteen-minute film, Heroes, included an eighty-second segment about Roy Benavidez, a Medal of Honor winner during the Vietnam War.¹⁷² The film was made available to schools, government agencies, veteran's organizations, and Hispanic organizations, and may have been shown at conventions at which Anheuser-Busch sponsored hospitality centers that gave out free beer.¹⁷³ The only mention of Anheuser-Busch in the film was a brief statement in the credits that the movie was "[m]ade possible by Anheuser Busch, Inc. and its family of wholesalers."¹⁷⁴ Benavidez argued that his name and likeness has been misappropriated by Anheuser Busch by attempting "to capitalize on Benavidez's good name and reputation and thereby benefit commercially *150 from it."¹⁷⁵ The Fifth Circuit disagreed, finding that "the makers of the film were not trying to increase the sales of [Anheuser-Busch's] products."¹⁷⁶ "Undoubtedly Anheuser Busch . . . may enjoy increased goodwill in the Hispanic community as a result of the production and showing of 'Heroes.' This incidental benefit, however, does not rise to the level of commercial benefit sufficient to support a claim for misappropriation."¹⁷⁷

The plaintiff in Meadows v. Hartford Life Insurance Co. was similarly unsuccessful in his right of publicity claim because of the incidental nature of the benefit to the defendant from the use of his name.¹⁷⁸ Meadows, a former employee of Camelot Music, sued Hartford after learning that Hartford maintained a life insurance policy in his name.¹⁷⁹ Without its employees' knowledge, Camelot had purchased 1,400 such life insurance policies on its employees that made Camelot the beneficiary of the policies.¹⁸⁰ Camelot used Meadows's name, date of birth, state of residence, and social security number for the purpose of purchasing the policies.¹⁸¹ Meadows alleged that Hartford benefitted financially from Camelot's disclosure of his personal information and sued for, *inter alia*, misappropriation of his name and identity.¹⁸² Meadows claimed that Hartford had received value from the use of his name because it received premiums for the policy on his life and could not have issued the policy without his identity.¹⁸³ Meadows also argued that his identity had value to himself because he known about the

insurance policies, he could have charged Camelot a fee for the use of his identity.¹⁸⁴ However, the Fifth Circuit found that the tort of misappropriation required “excessive exploitation” that results in a value reduction of the plaintiff’s identity.¹⁸⁵ Because Meadows did not contend that Camelot’s insurance policy prevented him from obtaining life insurance or otherwise reduced the value of his identity, the court found that there had been no *151 excessive exploitation.¹⁸⁶ Accordingly, Meadows had no misappropriation claim under Texas law.¹⁸⁷

iv) Not Used for a Newsworthy Purpose

A substantial use of an individual’s name or likeness for commercial purpose would nonetheless fail if the use were for a “newsworthy purpose.” This aspect of the first element of a right of publicity claim has received limited analysis in Texas. In O’Grady, the court found that there were, at a minimum, material issues of fact regarding whether Discovery’s use of O’Grady’s name in connection with promotions for Behind Enemy Lines was for a newsworthy purpose.¹⁸⁸ Discovery’s argument that the promotions “contained educational elements intended to contrast ‘the fact and fiction of true survival’” and the fact that O’Grady’s ordeal had been newsworthy several years earlier were not enough to entitle Discovery to summary judgment on O’Grady’s claim.¹⁸⁹

It seems likely that the Fifth Circuit in Benavidez would have found Anheuser-Busch’s use of Benavidez’s story to be subject to the newsworthy exception had it not found the use to be incidental, given the fact that the documentary merely recounted Benavidez’s story and did not attempt to tie that story to a commercial product, as Discovery had done in O’Grady.

2. The Plaintiff Can Be Identified from the Publication

Most of the right of publicity cases in Texas have involved uses of the name or photograph of an individual, and thus have provided relatively easy application of the requirement that the plaintiff be identifiable from the use. Courts in Texas, however, have shown a willingness, like the courts in California and other states, to find that this requirement has been satisfied even when something other than the name or a picture of the plaintiff is used. Henley, for instance, in finding that “Don’s henley” was the “likeness” of “Don Henley,” cited White, Carson, Motschenbacher, Ali, and Hirsch with approval, even though none of those cases involved the use of the plaintiffs’ name or literal image.¹⁹⁰

*152 In contrast, the district court in Elvis Presley Enterprises refused to find that the phrase “King of Dive Bars” to describe The Velvet Elvis and the inclusion of peanut butter and banana sandwiches on the bar’s menu could support a claim for a violation of Elvis’s right of publicity.¹⁹¹ “To trigger infringement the plaintiff must be clearly identifiable from use of the item or phrase in question. Such is not the case here.”¹⁹²

It is likely not necessary that even a majority of consumers viewing a publication can identify the plaintiff from the defendant’s use. In Henley, only 15% of those surveyed believed Henley was an endorser or spokesman for the ad, yet the court found that Henley was “reasonably identifiable.”¹⁹³

In Topheavy, the only evidence referred to by the court indicating that the plaintiff could be identified was the fact that the plaintiff’s brother told her that The Guy Game included her image and that the plaintiff was able to find her image on the Internet being used to promote the game.¹⁹⁴

The court in Falooma likely applied an unduly stringent test of whether the plaintiff could be identified from the photograph at issue. In finding that the plaintiffs did not meet this limitation, the Falooma court indicated that “[t]he two Hustler issues did not identify the plaintiffs in any manner [, t]here were no captions under the photographs, and neither the book review . . . nor the . . . excerpt referred to the plaintiffs by name or otherwise.”¹⁹⁵ However, the evidence also revealed that the plaintiffs first found out about their appearance in Hustler when a friend greeted them at a barbecue by saying, “You’re a star. You’re a star. You’re in Hustler magazine,”¹⁹⁶ though Hustler claimed that this was the only person who had ever identified the plaintiffs from the nude pictures and that he had previously seen the pictures in The Sex Atlas.¹⁹⁷ Nonetheless, the Falooma court’s focus on the lack of a caption seems to have been misplaced, as there was likely at least a fact issue as to whether the plaintiffs could be identified from the photographs. By way of comparison, *153 the Fifth Circuit in Matthews found that the plaintiff could be identified as the Jim Raynor character in Rush, “at least to the point of creating a genuine issue of fact.”¹⁹⁸

Thus, it is likely that courts in Texas would find that a plaintiff was identifiable if a variation of the plaintiff’s name, a nickname, a symbol associated with the plaintiff, or anything else identified with the plaintiff was recognized by more than a de minimis segment of the population. For instance, use of nicknames or first names alone of certain sports celebrities in

Texas for commercial purposes could likely support a right of publicity claim in Texas, even if they would not in other states. The unauthorized use of first names and nicknames such as “Hakeem” [Olajuwon] or “the Dream,” “Dirk” [Nowitzki], “Bags” [Jeff Bagwell], “Bidge” [Craig Biggio], “Vince” [Young], “Earl” [Campbell] or “Bum” [Phillips] to endorse a product would likely be identified by at least a large number of sports fans in Texas and give rise to a claim even without the use of the full name of those players or their photographs.¹⁹⁹ Likewise, use of the distinctive long beards and sunglasses of ZZ Top or the bandana and ponytail of Willie Nelson to promote a product would likely be readily identifiable by a large number of Texans, and give rise to a right of publicity claim by those musicians even without a mention of their name or showing their faces.

3. Some Advantage or Benefit to the Defendant

Finally, to maintain a right of publicity claim in Texas, an individual must show that the defendant reaped an advantage or benefit from the use of the name. “The notion that a benefit must inure to the defendant is intertwined with the factor requiring that the plaintiff prove the defendant appropriated the plaintiff’s name or likeness for its value and not for an incidental use.”²⁰⁰

In O’Grady, the application of this element was relatively straightforward. Discovery received a total of \$400,000 in ad time purchases from Fox for Behind Enemy Lines commercials as a part of the package that included the “stunt night,” including \$65,000 for ads for the stunt night alone.²⁰¹ After the stunt night, Discovery reported to Fox that over 25 million households tuned in to the broadcast of *154 the documentary, worth an estimated \$300,000 to Fox.²⁰² Thus, there was sufficient evidence of economic benefit to the defendants to create a genuine issue of fact.²⁰³

But it is not necessary to show that the defendant actually made money as a result of the use of the plaintiff’s identity. In Henley, the testimony of Dillard’s employees that they used the wordplay involving Henley’s name to catch consumer’s eyes and make the ad more interesting was sufficient to show that Dillard benefitted from the use.²⁰⁴ “The plaintiff in a right to publicity action is not required to show that the defendant made money off the commercial use of the name or likeness.”²⁰⁵ Thus, the Henley court dismissed Dillard’s testimony that it made little profit as a result of the ad, which it ran only once. “Dillard should be held liable because it received a benefit by getting to use a celebrity’s name for free in its advertising. Whether or not the advertising worked for Dillard is wholly irrelevant.”²⁰⁶

Thus, when a plaintiff shows that the defendant has used his or her name or image because of the value associated with it, it is likely that they will be able to show that the defendant benefited from its use, satisfying the final limitation of a Texas right of publicity claim.

C. Right of Publicity for the Deceased

Not all states have extended the right of publicity to deceased individuals. For instance, New York and several other states do not provide for any right of publicity after the death of an individual in their right of publicity statutes.²⁰⁷ In contrast, California Civil Code § 3344.1 specifically provides for a postmortem right of publicity in California.²⁰⁸

*155 In 1987, the Texas legislature explicitly gave a right of publicity to deceased individuals through chapter 26 of the Texas Property Code,²⁰⁹ stating that “[a]n individual has a property right in the use of the individual’s name, voice, signature, photographs, or likeness after the death of the individual.”²¹⁰ Chapter 26 only covers individuals who died on or after January 1, 1937,²¹¹ and, as discussed further below, provides that “[a] person may use a deceased individual’s name, voice, signature, photograph, or likeness in any manner after the 50th anniversary of the date of the individual’s death.”²¹²

The property right in an individual’s name or likeness is transferable in whole or in part before or after the death of the individual,²¹³ and transfers to the individual’s heirs upon their death if not otherwise conveyed.²¹⁴ If the deceased individual has not transferred the right and has no heirs, their postmortem right of publicity expires one year after their death.²¹⁵ Thus, in addition to creating a right of publicity for deceased individuals, the 1987 statute made it clear that living individuals may transfer the property right in their right of publicity to another individual or entity, which is consistent with the Restatement of Torts.²¹⁶ This transferability distinguishes the right of publicity in Texas from simply being a subset of the right of privacy, making it akin to other types of intellectual property.

Chapter 26 specifically prohibits use of a deceased individual’s name, voice, signature, photograph, or likeness “in any

manner, including[,] in connection with products, merchandise, or goods; or for the purpose of advertising, selling, or soliciting *156 the purchase of products, merchandise, goods, or services.”²¹⁷ However, chapter 26 specifically allows the following uses of a deceased individual’s name, voice, signature, photograph, or likeness:

- (1) a play, book, film, radio program, or television program;
- (2) a magazine or newspaper article;
- (3) material that is primarily of political or newsworthy value;
- (4) single and original works of fine art; or
- (5) an advertisement or commercial announcement concerning a use covered by (1)-(4).²¹⁸

Chapter 26 specifically codifies the “newsworthy” exception and various first amendment considerations to potential right of publicity claims on behalf of deceased individuals: “A media enterprise may use a deceased individual’s name, voice, signature, photograph, or likeness in connection with the coverage of news, public affairs, a sporting event, or a political campaign without consent.”²¹⁹ Any other use by a media enterprise that is “integally and directly connected with commercial sponsorship or paid advertising” requires consent of those with an ownership interest in the deceased individual’s persona.²²⁰ In contrast, no consent is required for use in a broadcast that “is not commercially sponsored or does not contain advertising.”²²¹ Individuals who own or work for a media enterprise are not personally liable for the use of a deceased individual’s persona unless the person “knew . . . the use was not authorized” by section 26.012 or “used the deceased individual’s name, voice, signature, photograph, or likeness in a manner primarily intended to advertise or promote the media enterprise itself.”²²²

Chapter 26 provides for damages which could be greatly in excess of the actual damages suffered by the owner of the property right. Chapter 26 provides that anyone violating it is liable for:

- (1) the greater of \$2,500 or damages sustained by the plaintiff;
- (2) the amount of profits attributable to the unauthorized use;
- (3) any exemplary damages; and

(4) reasonable attorney’s fees and court costs.²²³

*157 A plaintiff seeking attorneys’ fees should explicitly site section 26.013(a) in its pleading or risk waiving such a claim for attorneys’ fees.²²⁴

Chapter 26 also allows individuals who believe they have a property right in a deceased individual’s name, voice, signature, photograph, or likeness to register it with the Secretary of State by filing the form included at the end of this article as Appendix A and paying a \$25 fee.²²⁵ Such registration constitutes *prima facie* evidence of a valid claim to such a property right and is superior to an unregistered claim unless the registered claim is invalidated by a court.²²⁶ In the year following an individual’s death, executors, administrators, or guardians of the estate may exercise the property right on behalf of the estate.²²⁷ That right may only be exercised by the owner of the property right in the year following the death of an individual if the property right is registered.²²⁸ After the first year following the death of the individual, the owner of the property right need not have registered the property right to enforce it.²²⁹

In the months after the Texas legislature extended the right of publicity to deceased individuals, Buddy Holly, Marilyn Monroe, and James Dean were the first deceased individuals for whom property interests were registered with the Texas Secretary of State.²³⁰ More recently, registrations have been filed for the identities *158 of Johnny Carson, Richard Pryor, Johnny Cash, June Carter Cash, Evel Knievel, and former Houston Astro and Texas Ranger Ken Caminiti.²³¹ As of August 2009, over 170 individuals or entities, listed in Appendix B, have taken advantage of this provision and registered property interests in the names of over 120 different deceased individuals.²³²

Rights in a decedent’s persona in Texas last a maximum of fifty years: “A person may use a deceased individual’s name,

voice, signature, photograph, or likeness in any manner after the 50th anniversary of the date of the individual's death.”²³³ This fifty-year limitation is similar to that of other states that have provided for a postmortem right of publicity but shorter than the seventy-year limit under California law.²³⁴

D. Damages and Attorneys' Fees

Assuming one can make out a *prima facie* misappropriation case, it may nonetheless be difficult to calculate the compensatory value of that misappropriation. To date, Texas courts have taken a relatively flexible approach to the determination of damages based on the misappropriation of one's identity.

In *King v. Ames*, Wanda King, the daughter of deceased blues musician Freddie King, sued a music producer, Roy Ames, claiming that the producer marketed her father's recordings, and used his name and likeness to promote those recordings, without her permission.²³⁵ King had testified that she was familiar with the commercial value of her father's name and likeness because she previously had been involved with negotiations to market his name and likeness on T-shirts.²³⁶ Based on her experience, she testified that she thought Ames's misappropriation caused \$25,000 in damages.²³⁷ The jury found for King on her misappropriation of name and likeness claim and awarded \$27,000 in damages, but the trial court *159 granted judgment as a matter of law in favor of the defendant, finding that the defendant's testimony alone was not sufficient to support the damages amount.²³⁸ The Fifth Circuit reversed the district court, stating:

There is no specific formula King could have used in the alternative to show the value of an intangible property interest such as name and likeness. See *Zin v. W. Publ'g Co.*, 573 F.2d 1318, 1327 n. 19 (5th Cir. 1978). . . . Because the image was her father's and she had engaged in some limited transactions involving the marketing of her father's name and likeness, we cannot say that King's testimony was based on naked conjecture and speculation. As noted by the district court, like “goodwill” in a business, one's name and likeness is an intangible property interest which is not susceptible of proof with mathematical exactitude.²³⁹

Accordingly, the plaintiff's opinion testimony was sufficient to support the jury verdict.²⁴⁰

In *National Bank of Commerce*, the plaintiff's two experts testified that Heloise's endorsement of Shaklee would be worth \$3 million and \$5 million, respectively, while the defendant's expert testified that it would be worth \$25,000.²⁴¹ The court relied largely on the testimony of the defendant's expert, who had broad experience with negotiating endorsement deals for actors, actresses, and singers, in contrast to one of the plaintiff's experts who had never negotiated a national endorsement deal and the other who concentrated mainly on endorsement deals for athletes.²⁴² However, the court felt that the defendant's expert had understated Heloise's damages by basing his damages model on a cookbook author's endorsement contacts in 1967, six years before Shaklee's misappropriation.²⁴³ Accordingly, the court awarded the plaintiff \$75,000 in damages.²⁴⁴

*160 In the case of the misappropriation of the name or identity of a non-famous person who cannot show any financial loss as a result of the misappropriation, the plaintiff would likely be entitled to nominal damages.²⁴⁵

Exemplary damages may be available to right of publicity plaintiffs. Texas Property Code section 26.013(a)(3) explicitly allows for exemplary damages for misappropriation claims for deceased individuals, but does not vary the standard for proving exemplary damages.²⁴⁶ Like any plaintiff, a plaintiff seeking punitive damages for a violation of their right of publicity would need to show that their damages result from fraud, malice, or gross negligence.²⁴⁷

Exemplary damages have received limited discussion in Texas right of publicity cases. In *Moore*, the Fifth Circuit reversed a jury award of exemplary damages, finding no evidence “that Big Picture's decision to place Moore's name on the proposed staffing chart was maliciously made” and that Big Picture's failure to obtain permission to use Moore's name “alone is insufficient evidence of malice to support an award of exemplary damages.”²⁴⁸ The court in *National Bank of Commerce* upheld an award of exemplary damages against Shaklee for its use of Heloise's name to promote its products, finding that “Shaklee's conduct in using Heloise's name was intentionally and cleverly calculated to produce the inference that Heloise was associated with, approved, and endorsed Shaklee and Shaklee products,” and that “[s]uch intentional conduct cannot be allowed to go unpunished and undeterred.”²⁴⁹

In *Waits v. Frito-Lay, Inc.*, decided by the Ninth Circuit under California law, the court upheld an award of punitive damages

where it found that the evidence supported the jury's finding that Frito-Lay "acted with malice, i.e., despicably and with willful and conscious disregard of Waits' rights" by using a sound-alike singer *161 to sing one of his songs in a commercial.²⁵⁰ The evidence showed that Frito-Lay knew about Waits's policy of not doing commercials and that, according to his testimony, Waits felt that the effect of Frito-Lay's actions "was to tarnish the artistic integrity which he had striven to achieve."²⁵¹ Given the tendency of federal and state courts in Texas to follow Ninth Circuit and California law in applying Texas right of publicity law, Waits may prove instructive to Texas courts deciding whether to award exemplary damages, particularly to plaintiffs with a policy against doing endorsements.

Attorneys' fees are available under Texas law for claims based on the use of the name or likeness of a deceased individual.²⁵² However, attorneys' fees are likely not recoverable under Texas law for the misappropriation of the name or likeness of a living person. Claims for misappropriation of the name or likeness of an individual remain a matter of the common law and such claims are not among those causes of action for which a recovery of attorneys' fees is permitted under the Texas Civil Practices and Remedies Code.²⁵³

E. Federal Preemption

While right of publicity claims are generally not preempted by federal law, a right of publicity claim that only seeks relief for acts specifically protected by copyright law could be preempted. In *Daboub v. Gibbons*, the members of a band called the Nightcaps sued ZZ Top, alleging that ZZ Top's song Thunderbird copied the Nightcaps' song Wine, Wine, Wine.²⁵⁴ The Nightcaps asserted various federal claims, including copyright infringement, and state law claims, including misappropriation.²⁵⁵ The Fifth Circuit found that the misappropriation claim was preempted by federal copyright laws because the Nightcaps "failed to allege or produce evidence of any element, such as an invasion of personal rights . . . which *162 render[s] [their claims] different in kind from copyright infringement."²⁵⁶ For instance, the Nightcaps did not allege that ZZ Top used their name or likenesses to promote ZZ Top's song.

In *Brown v. Ames*, the plaintiffs--a number of blues musicians, songwriters, and their heirs--sued a record company specializing in vintage Texas blues records for copyright infringement for selling their music without permission and for misappropriation of their names and likenesses for using their names and photographs on the packaging for the music.²⁵⁷ The record company argued that the musicians had not presented an independent action for misappropriation because their names and pictures were used to identify their musical works, making the core of their misappropriation and copyright claims the same, compelling preemption.²⁵⁸ The Fifth Circuit, distinguishing *Daboub* and citing *Midler* and *Waits* with approval,²⁵⁹ disagreed:

[T]he content of the right protected by the misappropriation tort does not fall into the subject matter of copyright . . . As the district court correctly recognized, the tort for misappropriation of name or likeness protects 'the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.' Restatement (Second) of Torts § 652C (1977). In other words, the tort of misappropriation of name or likeness protects a person's persona. A persona does not fall within the subject matter of copyright--it does not consist of "a 'writing' of an 'author' within the meaning of the Copyright Clause of the Constitution." Furthermore, contrary to appellants' implications, appellees' names and likenesses do not become copyrightable simply because they are used to identify the source of a copyrighted work.²⁶⁰

The Fifth Circuit did note, however, that "common law on the right of publicity appears ordinarily to permit an authorized publisher or distributor to use name or likeness to identify truthfully the author or creator of the goods."²⁶¹ In other words, a right of publicity claim would likely not lie against a party who was authorized to distribute a copyrighted work who used a name or photo of the author to promote that work.

***163 F. Sovereign Immunity**

Right of publicity claims are likely not available in Texas against government actors. In *Chavez v. Arte Publico Press*, an author and playwright sued a publishing unit of the University of Houston, a public university, for copyright, Lanham Act, and right of publicity violations.²⁶² Chavez, who had several of her works published by Arte Publico, became dissatisfied with the publisher when it failed to correct several errors in earlier versions of her publications.²⁶³ Arte Publico subsequently published an anthology of plays, and a University catalog identified Chavez as the selector of the plays.²⁶⁴ Chavez objected

that her identification as the selector of the plays was “a misrepresentation of [her] sponsorship in violation of her right to publicity.”²⁶⁵ The University moved to dismiss based on Eleventh Amendment sovereign immunity.²⁶⁶ While the Fifth Circuit originally upheld the district court’s denial of a sovereign immunity defense with respect to portions of Chavez’s copyright and Lanham Act claims,²⁶⁷ Chavez conceded at oral argument that the abrogation of sovereign immunity in the federal statutes did not apply to her state law claim.²⁶⁸ The court therefore found that sovereign immunity barred her right of publicity claim against the University and a University official acting in his official capacity.²⁶⁹

In Jimenez v. Conley Magazine, L.L.C., Tejano musician Flaco Jimenez sued the city of San Antonio for allegedly using his photo in a publication for San Antonio newcomers to promote a music festival.²⁷⁰ The United States District Court for the Western District of Texas ruled that the Texas Tort Claims Act²⁷¹ (TTCA) did not waive San Antonio’s governmental immunity from Jimenez’s right of publicity *164 claim because the TTCA did not apply to intentional torts and misappropriation of likeness is an intentional tort.²⁷²

G. A Note on Personal Jurisdiction: Chang v. Virgin Mobile

An individual who would have a potential right of publicity claim under Texas law may nonetheless be unable to bring such a claim in Texas courts if a potential defendant lacks the minimum contacts required to invoke Texas jurisdiction. The plaintiff in Chang v. Virgin Mobile USA, LLC was unable to overcome just such an obstacle.²⁷³ Alison Chang is a teenager from Dallas, Texas.²⁷⁴ Her youth counselor, Justin Wong, took a picture of Chang, holding a peace sign, and posted it on the photo sharing site www.flickr.com.²⁷⁵ In posting the photo, Wong executed a “Creative Commons” license which effectively allowed the picture to be used by anyone, including for commercial purposes.²⁷⁶ Virgin Australia downloaded the photo from Flickr and used it in an Australian advertising poster campaign, urging Australians to “Dump Your Pen Friend.”²⁷⁷ Chang sued Virgin,²⁷⁸ asserting claims for invasion of privacy, libel, breach of contract, and copyright infringement.²⁷⁹ Chang’s “invasion of privacy” claim actually asserted that her right of publicity had been violated, claiming that “Virgin Mobile implicitly represented to the public that Alison consented to the use of her likeness to endorse Virgin Mobile’s products” and that “Alison’s image enhanced the advertising campaign because she possesses certain immutable characteristics--such as her age and appearance--that appeal to and attract Virgin Mobile’s target demographic.”²⁸⁰

The federal district court granted Virgin’s motion to dismiss for lack of personal jurisdiction. The court found that the location of a Flickr server in Texas and Virgin’s use of the Creative Commons license granted by Wong in Texas were insufficient to give the court jurisdiction over Virgin where there was no showing that *165 Virgin had performed any actions in Texas.²⁸¹ The court also found that even though Chang may have been affected in Texas by publicity surrounding the use of her picture in the ad campaign, because Virgin did not intentionally direct its actions at Texas, limiting the part of its advertising campaign using the photo to Australia, it lacked personal jurisdiction over Virgin.²⁸²

Thus, an individual in Texas may not have an actionable right of publicity claim in Texas against an out-of-state party unless the entity using the Texan’s name or likeness directs some of its misappropriating activities at Texas or otherwise has the required minimum contacts with Texas.

IV. The Road Forward

With the ongoing proliferation of websites dedicated to celebrities and the growing population of Texas, Texas courts are likely to face many issues regarding the right of publicity in the coming years. While courts applying Texas law have generally applied the law consistently with the Restatement of Torts and the courts of states more experienced with the right of publicity, this author suggests several ways in which courts should deal with heretofore undecided issues and one way in which deviation from the precedents of California law would be appropriate under Texas law.

A. Individuals Only--Corporations Need Not Apply

In Express One, the court declined to decide whether a corporation can sue for an invasion of privacy based on an alleged misappropriation of its name.²⁸³ The answer to that question should be an unequivocal “no.” As the Express One court acknowledged, “there is no Texas authority granting corporations a right of privacy.”²⁸⁴ The comments to section 652C of the Restatement (Second) of Torts make it clear that “[t]he interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity.”²⁸⁵ The United States Supreme Court, in its description of the right of

publicity, found that “the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such [activity].”²⁸⁶ Moreover, the Texas legislature, in granting a right of publicity to the deceased, stated *166 that “[a]n individual has a property right in the use of the individual’s name, voice, signature, photograph, or likeness after the death of the individual.”²⁸⁷ Given the underpinnings of the right of publicity in the right of privacy²⁸⁸ and the Texas legislature’s limitation of that postmortem right to individuals, there is no basis for expanding the right of publicity to corporations or other entities other than individuals. Business entities have sufficient protection from unauthorized uses of their names from federal and state trademark and unfair competition law.

B. Limiting the Scope of Protection for “Identity”

As discussed above, in *White v. Samsung Electronics America, Inc.*, the Ninth Circuit found that a robot with a blond wig, gown, and jewelry, positioned next to the board from the *Wheel of Fortune*, was not the “likeness” of Vanna White.²⁸⁹ Thus, White could not maintain a claim under California Civil Code § 3344, which prohibits the commercial use of a person’s “name, voice, signature, photograph, or likeness” without their consent.²⁹⁰ However, the Ninth Circuit found that Samsung had appropriated the “identity” of White, which was sufficient for her to maintain a common law right of publicity claim.²⁹¹ Although several courts applying Texas law have cited *White* with approval, the *White* decision should not be relied upon to extend right of publicity protection to an individual’s “identity” where that individual’s name, likeness, or other characteristics unmistakably associated with that individual are not used and there is no implied endorsement by the individual whose “identity” is allegedly invoked.

The first element of a right of publicity claim under Texas law requires proof that the defendant appropriated the plaintiff’s “name or likeness” for the value associated with it.²⁹² The comments to the Restatement (Second) of Torts state that the right of publicity protects “the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness.”²⁹³ Although the Restatement (Third) of Unfair Competition does indicate that protection *167 can be appropriate for a “person’s name, likeness, or other indicia of identity,”²⁹⁴ the comments also indicate that among the rationales for the right of publicity are to “prevent harmful or excessive commercial use that may dilute the value of the identity” and to afford “protection against false suggestions of endorsement or sponsorship.”²⁹⁵ Like the California statute for living individuals, the Texas statute covering deceased individuals protects an “individual’s name, voice, signature, photograph, or likeness.”²⁹⁶ Neither the Texas common law, the Restatements, nor the statute covering deceased individuals supports allowing a cause of action for appropriating someone’s “identity” where their name or likeness or any of the other aspects of personality named in the Texas Property Code is not used and there is no implied suggestion of endorsement by the individual whose “identity” is supposedly invoked.

There are a number of decisions other than *White* in which neither the literal name or likeness of the plaintiff was used, but in which there was nonetheless a clear effort to either suggest endorsement or sponsorship by the celebrity, or at the very least, a lack of effort to avoid an obvious association with the celebrity. In *Motschenbacher*, the picture of the plaintiff’s race car was sufficiently distinctive and recognizable, notwithstanding the minor alterations made by R.J. Reynolds, such that the implied message of the advertisement was “Lothar Motschenbacher is driving the car in this advertisement, and making positive statements about Winston cigarettes,” as shown by the cartoon text bubbles coming from his head.²⁹⁷ In *Midler and Waits*, by purposefully selecting singers to sound like Midler and Waits respectively, those creating the advertisements at issue were sending the message that “Bette Midler and Tom Waits are singing these songs and (at least implicitly) endorsing these products.”²⁹⁸ In *Henley*, at least some portion of the public thought that the use of the phrase “Don’s henley” indicated that Don Henley was somehow associated with shirts being sold at Dillard.²⁹⁹ The uses of “Here’s Johnny” and “Elvis Has Left the Building” in association with portable toilets and a bar, respectively, while not literally saying that “Johnny Carson or Elvis has endorsed this place of business,” nonetheless used phrases so unmistakably associated with Johnny Carson and Elvis Presley that it is reasonable to expect that some portion of the *168 population would link the commercial product with the celebrities.³⁰⁰ Thus, in all of these cases, the rights being protected and the values being preserved were the very same rights and values being protected by preventing the use of an individual’s name or likeness for commercial purposes.³⁰¹

Such is not the case with *White*. Surely the message of the advertisement was not: “Someday Vanna White will become a robot, after which she will continue to work on the *Wheel of Fortune* and watch her Samsung TV.” To the contrary, the message of the advertisement was “Samsung TVs will be around for so long that a robot, instead of Vanna White, will be turning letters on the *Wheel of Fortune* when you are still watching your Samsung TV.” As the dissent pointed out in *White*:

The only characteristic in the commercial advertisement that is not common to many female performers or celebrities is the imitation of the “*Wheel of Fortune*” set. . . . The *Wheel of Fortune* set, however, is

not an attribute of Vanna White's identity. It is an identifying characteristic of a television game show, a prop with which Vanna White interacts in her role as the current hostess. To say that Vanna White may bring an action when another blond female performer or robot appears on such a set as a hostess will, I am sure, be a surprise to the owners of the show.³⁰²

To be fair to the Ninth Circuit, the defendants did refer to the robot ad internally as the "Vanna White ad," which likely influenced the Court's decision.³⁰³ And the court did find that White could not maintain a claim under the California statute for the commercial use of a person's "name, voice, signature, photograph, or likeness."³⁰⁴ But in allowing White to maintain a common law claim for the appropriation of her "identity," the Ninth Circuit ignored the purpose of the right of publicity and gave protection to White for things associated with her that were too *169 far removed from a use of her name or likeness and lacking in any implied endorsement or sponsorship of Samsung TVs.³⁰⁵

Limiting the scope of White would not save the likes of Ty, Inc. from a right of publicity claim in response to its sale of dolls sharing the names of the President's daughters, discussed in the introduction. Although the dolls were not literally the reproduced images of Sasha and Malia Obama, the fact that the two young African American dolls were released together, within days of President Obama's inauguration, and bore the (relatively uncommon) names of the Obama sisters, left the unmistakable impression in the public's eye that the dolls were intended to represent the Obama sisters.³⁰⁶ The prohibitions against the use of someone's "name" and "likeness" for the value associated with them provides sufficient protection against the exploitation of one's personality such that protecting the "identity" of someone where their name or likeness has not been used and there is not otherwise an implied association of that individual with the product should not be necessary to give the right of publicity under Texas law sufficient scope and power.

C. The Non-famous--The Difficult Question of "Value"

When someone uses the name or likeness of a famous person in connection with an advertisement or other commercial promotion, there is usually little question that the celebrity's name is being used because it adds value to the advertisement. When the name or image of a non-famous person is used, the issue of whether there is some value associated with that name or likeness that could support a right of publicity claim is less clear, and courts and practitioners should use caution when deciding whether a non-celebrity can maintain a right of publicity claim.

Both Hamilton and Moore handled claims brought by non-celebrities correctly. Hamilton's name and signature had some value to the insurance company sending out solicitation letters, else the company would not have included them in the offer letters.³⁰⁷ But the court also correctly found that only nominal damages were proper, given the likely nominal difference in value to the consumer between *170 a signed solicitation letter and an unsigned letter.³⁰⁸ As for Moore, Moore's name had value to the individuals at Kelly Air Force base who were selecting a new audio-video provider, and the jury found that Big Picture received the benefit of that value by using his name to solicit the contract with the Air Force base.³⁰⁹

Although the court followed the letter of the law in *Topheavy*, the case presents a less traditional example of the use an individual's image for the value associated with it. Other than the plaintiff's brother, there was nothing in the record indicating that anyone recognized the plaintiff in either the promotions for The Guy Game or in the game itself.³¹⁰ Had the plaintiff merely been listed as someone who appeared in the game, the use of her name would have had no "value" to most potential purchasers of the game. However, because her picture was used, and because she was presumably attractive, her likeness had value to purchasers of the game and to *Topheavy*. At least with respect to the promotions for the game, the message sent by *Topheavy* to potential purchasers through the use of plaintiff's image was: "You will have the opportunity to view this woman and others like her topless if you buy this game."³¹¹ Accordingly, the *Topheavy* court was correct in finding that plaintiff's image had been used for the value associated with it.

But not every use of a non-famous individual's picture in an advertisement or a part of a commercial product would be a use of their image for the value associated with it. Imagine a genealogy program that allows individuals to organize information about their family tree. The seller of the program includes a half dozen photos of various families (none including celebrities) in advertisements for the program and on its packaging.³¹² The message sent by the use of those photos would not be "these people endorse this product" or "these people are featured in this product," but rather "you can keep track of your family information by using this product." In this case, the images of the likenesses of these individuals would not be used for the value associated with their individual images; rather, the photos would be used because of their value as generic family

photos. Similarly, if a baseball *171 video game included a picture of a crowd at a baseball game, the photos would not be used because of the value of the images of the individuals in the crowd, but rather because of the value of having a picture of a crowd to convey the excitement of a baseball game, which is hopefully replicated by the video game version. In these hypothetical cases, the pictured individuals should not be able to maintain right of publicity claims because their images would not be used because of the value associated with their individual images.³¹³ They are, literally, just faces in the crowd.

Similarly, it is questionable whether Alison Chang, the teenage subject of a Virgin Mobile ad campaign in Australia, would have a right of publicity claim against Virgin even if personal jurisdiction could be established against Virgin in Texas. Rather than implying an endorsement of its product by Chang, someone apparently unknown to anyone in Australia, the ad suggested that Australian consumers should use Virgin Mobile's phone service instead of keeping an ongoing relationship with the proverbial "pen friend" represented by Chang.³¹⁴ The photo was used by Virgin not because of any value that Chang's likeness had in endorsing Virgin products. Instead, more similar to the derisive uses of the company's name in Express One or the use for parody of the bodybuilder's image in Busch, Virgin's use of Chang's image in the advertisement urged consumers to use Virgin's mobile phone services to the exclusion of a pen-friend relationship with Chang or other potential or existing pen-friends.³¹⁵ The rationales for the right of publicity, including preventing the dilution of the value of one's identity and preventing a false endorsement,³¹⁶ would not support Chang's right of publicity claim under Texas law. Given the implied message of Virgin's ad that Chang was not the type of person with whom the viewer should continue a pen-friend relationship, Chang's libel claims would be more appropriate under Texas law.

Accordingly, while noncelebrities may maintain right of publicity claims, courts and practitioners should proceed with caution when analyzing such claims *172 brought by non-celebrities to ensure that all of the requirements of such a claim are met.

D. Rights for the Deceased--Fifty Years and Done

There have been no cases in Texas examining what right, if any, the heirs to a deceased individual have to control the use of their name or image more than fifty years after their death. Earlier this year, as the fiftieth anniversary of Buddy Holly's death approached, doubts about what rights Holly's widow would have to control the use of Holly's name and likeness hung over her negotiations with the city of Lubbock.³¹⁷ While some have argued that there could be common law rights affecting the use of Holly's name and likeness even today, more than fifty years after Holly's death,³¹⁸ the Texas Property Code seems to answer the question unequivocally: "A person may use a deceased individual's name, voice, signature, photograph, or likeness in any manner after the 50th anniversary of the date of the individual's death."³¹⁹ Notably, the statute does not merely say that any rights granted by chapter 26 expire after fifty years, but expressly grants the public the permission to use a deceased individual's name, voice, signature, photograph, or likeness "in any manner after the 50th anniversary" of their death.³²⁰ While the statute explicitly indicates that chapter 26 "does not affect a right an individual may have in the use of the individual's name, voice, signature, photograph, or likeness before the death of the individual,"³²¹ there is no explicit reservation of any other rights that someone might have in the name voice, signature, photograph or likeness of a deceased individual. Accordingly, under Texas right of publicity law there are no prohibitions upon using the name or likeness of a deceased individual after fifty years.

What, if anything, can the owner of a right of publicity in a deceased celebrity do to prevent that celebrity's name or image from being used in Texas for commercial or other valuable purposes more than fifty years after their death? Because James Dean, still a cultural icon, died in 1955, someone who has the copyright to a photograph of James Dean could use that photograph in conjunction with any sort *173 of commercial enterprise, provided its use was limited to Texas or other states in which Mr. Dean's right of publicity had expired, without being subject to a right of publicity claim. Apparently recognizing that this problem exists in Texas and in other states in which the rights of publicity expire fifty years or less after the death of an individual, the James Dean Foundation and CMG International, the Indiana-based company that handles the licensing of Dean's image,³²² began registering trademarks on Dean's name in association with a variety of products in the 1980s.³²³ Assuming these registrations are valid and CMG has followed all the necessary steps to maintain an enforceable trademark, in all likelihood federal trademark law and the Supremacy Clause would prevent a commercial use of James Dean's name, even in Texas. Moreover, any national advertising program that came into contact with Indiana at all would likely subject the user of James Dean's image to the Indiana right of publicity law, which provides for a one-hundred-year postmortem right of publicity³²⁴ and protects individuals "regardless of a personality's domicile, residence, or citizenship."³²⁵ It remains an open question whether using Dean's image to promote a product in Texas would infringe CMG's trademark on the name "James Dean."³²⁶

Similar issues now face CMG and Buddy Holly's widow. Holly's heirs have apparently recognized the tenuous nature of his publicity rights in Texas and other states and filed a series of trademark applications on his name in 2005 that issued in *174 2006.³²⁷ They filed five more trademark applications covering his name and signature in March and April 2008, four of which issued as trademarks and service marks in July 2009.³²⁸ Again, it remains to be seen whether these trademarks in Holly's name or signature would give the owners the right to control uses of his image in states in which his postmortem right of publicity has expired.

While the manner in which the laws of other states or federal trademark law could be used to limit the use of the name or likeness of a long-dead celebrity is unclear, no claim under Texas right of publicity law should lie for the heirs of a celebrity who has been deceased for more than fifty years.

E. Flexibility in Damages Calculations

Courts applying Texas right of publicity law have wisely taken a flexible approach to calculating damages. Not everyone whose name or likeness has potential value has had an opportunity to freely negotiate a value for the use of their name or likeness before having it exploited by someone without their permission. The Fifth Circuit properly recognized in King v. Ames that given the intangible nature of the right of publicity, flexibility is needed to allow individuals to receive full compensation for the value of their names and likenesses.³²⁹ If anyone should bear the risk of some inexactitude in the calculation of damages, it should be those who use the names or likenesses of others for commercial purposes. The minimum damages of \$2,500 provided under chapter 26 for deceased individuals,³³⁰ or perhaps the equivalent amount in 2009 dollars, is a good indicator of the nominal damages that should be allowed for a living non-celebrity plaintiff whose name or likeness is appropriated for the value associated with it.

V. Conclusion

While not as thoroughly litigated and examined as its counterpart rights in states such as California and New York, the right of publicity in Texas is a robust right that has been analyzed sufficiently by state and federal courts applying Texas law to give courts and practitioners a general idea of its breadth. Yet many issues remain open, awaiting further exploration in the future. Given the growing population of Texas and the increasing internationalization of media and public figures, it *175 is likely that the right of publicity in Texas will play an increasingly important role in the regulation of the use of celebrity and noncelebrity images for commercial and other valuable purposes.

***176 VI. APPENDIX A**

OFFICE OF THE SECRETARY OF STATE

REGISTRATION OF CLAIM FOR THE USE OF A DECEASED INDIVIDUAL'S NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS

(Texas Property Code, Section 26.006)

1. The legal name of deceased individual:

2. Other names by which deceased individual was known:

3. Date of death of deceased individual: _____ / _____ / _____

4. Name of claimant:

5. Address of claimant:

6. Basis of claim [Check appropriate statement]

I make this claim as successor-in-interest on the basis that:

(1.) I am the Independent Executor or _____ *177 of the Estate of _____,

OR

(2.) I am the surviving() spouse() child() grandchild() parent,

OR

(3.) The property rights of said deceased individual have been transferred to me by

() contract() trust() will.

*178 7. Statement of the right claimed:

A. Percentage of interest claimed:

() 100% () 50% () 25% () _____ %

B. The above percentage is claimed in

() All types of rights

OR

() Limited rights described as follows:

Signature of Claimant

STATE OF _____

COUNTY OF _____

Before me, a notary public, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing document and, being by me first duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this _____ day of _____, _____

Notary Public Signature

Notary Public Printed or Typed Name

*179 My commission expires: _____

***180 INSTRUCTIONS**

1. The filing fee is \$25.00. The check should be made payable to the Secretary of State.
2. The completed form and filing fee should be sent to the Office of the Secretary of State, Statutory Documents Section, P.O. Box 13550, Austin, TX 78711-3550.
3. The claim is filed pursuant to Section 26.006 of the Texas Property Code. The date of filing is the date of receipt by the Secretary of State of a properly executed form and the required \$25.00 filing fee.
4. The claim will not be filed if any of the statements on the claim are not completed, the statement is not properly signed and verified or the filing fee has not been submitted. A rejection letter will be sent stating the reason or reasons the claim was not filed.
5. Any questions should be directed to (512) 475-1769.

***181 VII. APPENDIX B**

CLAIMS TO PROPERTY RIGHTS IN DECEASED INDIVIDUALS' NAMES AND IMAGES FILED WITH THE TEXAS SECRETARY OF STATE PURSUANT TO TEXAS PROPERTY CODE § 26.006

DECEASED INDIVIDUAL	CLAIMANT	DATE FILED
ALBERT EINSTEIN	THE HEBREW UNIVERSITY OF JERUSALEM	January 12, 1996
ALBERT EINSTEIN	AMERICAN FRIENDS OF THE HEBREW UNIVERSITY	March 28, 1988
ALFRED M. "BILLY" MARTIN; ALFRED MANUAL MARTIN; BILLY MARTIN	MRS. JILLIANN MARTIN	November 3, 1992
ALVIS JAMES WILLIAM KIMMELL	PAUL WEST KIMMELL	February 15, 2007
ALVIS JAMES WILLIAM KIMMELL	PAUL WEST KIMMELL	February 22, 2007

ANSEL ADAMS; ANSEL EASTON ADAMS	THE ANSEL ADAMS PUBLISHING RIGHTS TRUST	October 20, 1993
ANTHONY RUDOLFO QUINN	KATHERINE QUINN EXECUTRIX OF THE ESTATE OF ANTHONY RUDOLFO QUINN	January 21, 2003
ARNETT CLEOPHUS COBB "BIG RED", "HOSS", "ROOSTER"	LIZETTE CARLOTTA COBB	January 14, 1998
ARTHUR MARX; HARPO MARX	SUSAN MARX	March 23, 1988
ARTHUR STANLEY JEFFERSON LAUREL	LARRY HARMON PICTURES CORPORATION	March 8, 1994
BALDEMAR HUERTA aka FREDDY FENDER; THE BEBOP KID; EDDY MEDINA; SCOTTY WAYNE	EVANGELINA HUERTA	November 24, 2008
BELA LUGOSI	BELA G LUGOSI	March 21, 1988
BEN HOGAN	CALLAWAY GOLF COMPANY	May 11, 2004
BEN HOGAN	W A MONCRIEF JR AND KEN PEARCE MD INDEPENDENT CO-EXECUTORS	June 21, 2000
BEN HOGAN	SPALDING SPORTS WORLDWIDE INC	August 23, 1999
BEN HOGAN	HOGAN ROYALTY PARTNERS L P	January 17, 2006
BERNIE NEIL MALONE BERNIE MALONE, BERNIE N. MALONE, BERNIE N MALONE	KEITH D PATSCHKE	August 16, 2000
BETTY GRABLE; ELIZABETH RUTH GRABEL; BETTY GRABEL JAMES	VICTORIA ELIZABETH JAMES BIVENS	June 27, 1988
BETTY GRABLE; ELIZABETH RUTH GRABLE	JESSICA YAHNER	June 20, 1988
BETTY JEANNE GUERRIERO aka GAIL DAVIS TV'S ANNIE OAKLEY	TERRIE JEANNE DAVIS	March 13, 1998
BILL NEWTON DAVID BURLESON	DAVID BURLESON	August 28, 1997
BILLY LEE HIELSCHER, MR BARDALL, BILLY HIELSCHER	CINDI HIELSCHER MCMILLAN	January 16, 2004
BOB MARLEY	FIFTH-SIX HOPE ROAD MUSIC LTD. A BAHAMIAN INTL BUSINESS CO	April 2, 2008
BORIS KARLOFF; WILLIAM HENRY PRATT	EVELYN KARLOFF	March 11, 1988

BRUCE CAMPBELL IRVINE; BRUCE C IRVINE	CHRISTINA IRVINE ODOM	August 12, 1996
BUFORD THOMAS GOTHARD	DOROTHY GOTHARD	January 6, 2004
BUFORD THOMAS GOTHARD	DIANE ELAINE WALTER	January 6, 2004
BUFORD THOMAS GOTHARD	PATRICIA ANN HUCKABAY	January 6, 2004
CABELL CALLOWAY; CAB CALLOWAY	CALLOWAY ENTERTAINMENT	July 3, 1995
CHARLES HARDIN HOLLEY; BUDDY HOLLY	MARIA ELENA HOLLY	September 29, 1987
CHARLES SPENCER CHAPLIN; CHARLIE CHAPLIN	BUBBLES INCORPORATES S. A.	March 23, 1988
CHARLES WILLIAM BOLINGER CHARLES W BOLINGER;CW BOLINGER;CHARLES BOLINGER;C BOLINGER;BOLINGER & CO;BOLINGER OIL; BOLINGER & COMPANY;BOLINGER OIL Company; CW BOLINGER ET AL;CHARLES W BOLINGER ET AL	MILTON GASHY	November 30, 2000
CHARLES WILLIAM MADSEN JR JUANITA F MADSEN	CHARLES W MADSEN III	November 18, 1997
CLARENCE GREEN JR CLARENCE GREEN AND THE RHYTHM ARIES CLARENCE GREEN AND THE FOUR DIVISIONS	FALETA GREEN ADMINISTRATIX	May 18, 1998
CLARK GABLE	WELLS FARGO BANK TRUSTEE FOR JOHN CLARK GABLE	May 26, 1988
CLARK GABLE	WELLS FARGO BANK TRUSTEE FOR KATHLEEN G GABLE	May 26, 1988
CLINTON WILLIAMS MURCHISON, JR; C. W. MURCHISON, JR.; CLINT W. MURCHISON	BURK C. MURCHISON	January 28, 1991
CLINTON WILLIAMS MURCHISON, JR; C. W. MURCHISON, JR.; CLINT W. MURCHISON	ANNE E MURCHISON	January 28, 1991
CLINTON WILLIAMS MURCHISON, JR; C. W. MURCHISON, JR.; CLINT W. MURCHISON	CLINT W MURCHISON III	January 28, 1991
CLINTON WILLIAMS MURCHISON, JR; C. W. MURCHISON, JR.; CLINT W. MURCHISON	COKE ANNE SAUNDERS	January 28, 1991

CLINTON WILLIAMS MURCHISON, JR; C. W. MURCHISON, JR.; CLINT W. MURCHISON	ROBERT F. MURCHISON	January 28, 1991
DAVID ISAAC CATNEY	DOLORES A CATNEY	July 16, 2001
DEBORA SUE SCHATZ MAY	BARBARA SCHATZ	April 29, 1993
DIANA, PRINCESS OF WALES DIANA SPENCER, DIANA WINSOR, HRH DIANA PRINCES OF WALES	THE HONOURABLE LADY ELIZABETH SARAH LAVINIA MCCORQUODALE	January 20, 1998
DORIS LEE WASH	MICHAEL RAY WASH SR	August 8, 2007
DR HECTOR P. GARCIA AKA Hector Perez Garcia, M D	WANDA FUSILLO GARCIA	July 1, 2008
DR ROYCE LEWIS; DR LEWIS; ROYCE C LEWIS JR MD	ROYCE C LEWIS III	June 22, 1994
DR. HECTOR P. GARCIA	CECILIA GARCIA AKERS	July 1, 2008
DUANE ALLMAN	GALADRIELLE ALLMAN	May 31, 1995
EDWARD CHESTER BABCOCK aka James "Jimmy" Van Heusen	BABCOCK FAMILY - GENERAL PARTNERSHIP	January 28, 2008
EDYTHE MARRENNER SUSAN HAYWARD	GREGORY MARRENNER BARKER	June 1, 1998
EDYTHE MARRENNER SUSAN HAYWARD	TIMOTHY MARRENNER BARKER	June 1, 1998
ELVIS A PRESLEY	ELVIS PRESLEY ENTERPRISES INC	July 28, 1993
ERIC H NELSON RICK NELSON OR RICKY NELSON	THE RICK NELSON COMPANY LLC	September 17, 1998
ERIC HILLIARD NELSON RICKY NELSON A/K/A RICK NELSON	CARSEY-WERNER PRODUCTIONS LLC	July 27, 1998
EUGENE CURRAN KELLY, GENE KELLY	EUGENE C KELLY IMAGE TRUST	August 11, 2003
FORTUNATO CERVANTES	YOLANDA CERVANTES	February 5, 2008
FRANK LLOYD WRIGHT	THE FRANK LLOYD WRIGHT FOUNDATION	October 6, 1997
FRANKLIN LINDSAY	THE CHASE MANHATTAN BANK TRUSTEE FOR THE FRANKLIN LINDSAY STUDENT AID FUND	November 27, 2000
FREDDY KING	WANDA KING	February 26, 2001

FREDERICK CHARLES CUNY	CHRIS CUNY	November 26, 1997
GENE AUTRY	JACQUELINE E AUTRY AND STANLEY B SCHNEIDER	December 4, 1998
GEORGE ROBERT PHILLIPS (SPANKY) MCFARLAND; SPANKY; GEORGE (SPANKY) MCFARLAND; GEORGE (SONNY) MCFARLAND; GEORGE (MAC) MCFARLAND	DORIS JUANITA MCFARLAND	November 29, 1993
GEORGE ROBERT PHILLIPS MCFARLAND; GEORGE "SPANKY" MCFARLAND; SPANKY MCFARLAND	KING WORLD PRODUCTIONS INC	October 5, 1994
GERALDINE G. ABBOTT aka GERALDINE GAINES	TERRY ANN KAWASMI	February 2, 2009
GLENN H MCCARTHY	CHRISTINA BEARD	March 9, 1990
GRANDERSON D PREWITT AKA G D PREWITT	LATHETTE BROOKS SR	May 31, 2005
GREER GARSON FOGELSON; GREER GARSON	JOHN L ROACH AND NATIONSBANK OF TEXAS N A	September 3, 1996
GRETA GARBO	GRAY GUSTAFSON REISFIELD	May 11, 1990
HARRIET HILLIARD NELSON HARRIET NELSON	CARSEY-WERNER PRODUCTIONS LLC	July 27, 1998
HARRIET NELSON	THE RICK NELSON COMPANY LLC	September 17, 1998
HARRIET NELSON	DAVID NELSON	September 17, 1998
HARRY BOUTON BLACKSTONE JR HARRY BLACKSTONE BLACKSTONE THE MAGICIAN	GAY BLACKSTONE	March 13, 1998
HARRY LILLIS CROSBY JR; BING CROSBY	HLC PROPERTIES LTD, A CALIFORNIA LIMITED PARTNERSHIP	March 25, 1988
DONALD LEE HASKINS, aka DON HASKINS; DON L HASKINS; DON THE BEAR HASKINS; THE BEAR; COACH HASKINS & HASKINS	MARY L HASKINS AND SURVIVING CHILDREN: BRENT D HASKINS, JOHN S HASKINS & DAVID K HASKINS	April 2, 2009
HOWARD HUGHES	SUMMA CORPORATION	December 6, 1993
JACK RANDOLPH WEBB; JACK WEBB	OPAL WEBB	February 29, 1988
JACK WEBB; JACK RANDOLPH WEBB	LISA WEBB	May 6, 1988

JACK WEBB; JACK RANDOLPH WEBB	STACY WEBB	May 6, 1988
JACQUES YVES COUSTEAU	THE COUSTEAU SOCIETY INC	May 30, 2002
JAMES BRYON DEAN; JAMES DEAN; JIMMY DEAN	JAMES DEAN FOUNDATION	January 11, 1988
JAMES BYRD JR	ELIGAH RICKY JASON	June 11, 2002
JAMES BYRD JR	ROSS P BYRD	June 11, 2002
JAMES BYRD JR	ANTHONY A WHITEHURST	November 7, 2002
JAMES CAGNEY	MAX J & WINNIE S ROSENSHEIN FOUNDATION INC	October 17, 2002
JAMES FRANCIS DURANTE; JIMMY DURANTE	CECILIA DURANTE	April 25, 1988
JAMES FRANCIS DURANTE; JIMMY DURANTE	MARGARET A DURANTE	March 11, 1988
JAMES MARSHALL HENDRIX, JIMI HENDRIX	AUTHENTIC HENDRIX LLC	April 26, 2004
JAMES MARSHALL HENDRIX; JIMI HENDRIX	AUTHENTIC HENDRIX LLC BY JANIE HENDRIX-WRIGHT PRESIDENT	May 20, 1996
JAMES W PARKER DC	PARKER COLLEGE OF CHIROPRACTIC	December 9, 1999
JESS NEWTON	DAVID BURLESON	August 28, 1997
JESSE LYONS	SAMUEL VERNON LYONS	August 11, 2008
JILES PERRY RICHARDSON JR	ELIZABETH JEAN BARROW AS GUARDIAN OF DEBRA JOY RICHARDSON BRIDGES AN INCAPACITATED PERSON	December 21, 2000
JILES PERRY RICHARDSON JR; J P RICHARDSON; J P RICHARDSON JR; THE BIG BOPPER; BIG BOPPER; JAPE	ADRIANNE JOY RICHARDSON WENNER	January 23, 1989
JILES PERRY RICHARDSON JR; J P RICHARDSON; J P RICHARDSON JR; THE BIG BOPPER; BIG BOPPER; JAPE	JAY PERRY RICHARDSON	January 23, 1989
JILES PERRY RICHARDSON; J. P. RICHARDSON; "THE BIG BOPPER"; JAPE RICHARDSON	DEBRA RICHARDSON BRIDGES (JEAN BARROW, GUARDIAN)	August 7, 1992

JOE NEWTON	DAVID BURLESON	August 28, 1997
JOHN "JOHNNY" CASH	JOHN R CASH REVOCABLE TRUST	January 22, 2008
JOHN RUSSELL CROUCH; HONDO CROUCH	THE CROUCH PARTNERSHIP	March 27, 1997
JOHN W CARSON	THE JOHN CARSON FOUNDATION	June 4, 2008
JOHN W CARSON FKA JOHNNY CARSON	ALEXIS M CARSON AND LAWRENCE L WITZER	September 6, 2005
JOHN YOUNG NELSON FKA JOHN L NELSON, JOHN F NELSON	CAROL ABOLD-ARELLANO	April 4, 2005
JOHNNY WEISSMULLER; PETER JOHNNY WEISSMULLER	MARIA WEISSMULLER	May 18, 1988
JONAS EDWARD SALK;JONAS E SALK; J E SALK; JONAS SALK; DR SALK JONAS; SALK	PETER L SALK	April 21, 1997
JONAS EDWARD SALK;JONAS E SALK; J E SALK; JONAS SALK; DR SALK JONAS; SALK	DARRELL SALK M D	April 21, 1997
JONAS EDWARD SALK;JONAS E SALK; J E SALK; JONAS SALK; DR SALK; JONAS; SALK	JONATHAN D SALK M D	April 21, 1997
JOSEPH PAUL DIMAGGIO	DIMAGGIO LLC	August 2, 1999
JOVITA JONES	SAMNIKOLE JOVIAN	March 31, 2005
JULIA GOINGS FKA JULIA NELSON, JULIA NELSON-GOINGS	CAROL ABOLD-ARELLANO	April 4, 2005
JUNE CARTER CASH	JOHN R CASH REVOCABLE TRUST	October 3, 2008
KALPANA CHAWLA FKA MONTU CHAWLA	JEAN-PIERRE HARRISON	March 31, 2005
KATIE LENNEX	DANNY MYLES	May 5, 2004
KENNETH G CAMINITI	LINDSEY L CAMINITI	October 6, 2005
KENNETH G CAMINITI	KENDALL M CAMINITI	October 6, 2005
KENNETH G CAMINITI	NICOLE P CAMINITI	October 6, 2005
KURT DONALD COBAIN	THE END OF MUSIC LLC C/O CODIKOW, CARROLL, GUIDO & GROFFMAN, LLP	January 19, 1999
LAURA LORENA ALANIS LUGO	OFELIA S ALANIS, SOLE	July 22, 1996

MANAGING CONSERVATOR FOR
BRENDA LUGO,

LEE STRASBERG	ESTATE OF LEE STRASBERG (ANNA STRASBERG, EXECUTRIX)	February 28, 1992
LEONARD MARX; CHICO MARX	MARY MARX	March 28, 1988
LEWIS M GIZZARD JR	BAD BOOT PRODUCTIONS	September 29, 1994
LOUIS C STEVENSON III; B W STEVENSON	JAN MARIE STEVENSON	July 5, 1988
LOUIS DANIEL ARMSTRONG; LOUIS ARMSTRONG	DAVID GOLD	March 17, 1988
LOUIS L'AMOUR, LOUIS DEARBORN LAMOORE; TEX BURNS; AND JIM MAYO	KATHERINE E L'AMOUR	October 24, 2002
LOUIS PRIMA	GIA M PRIMA	September 13, 2006
MAE WEST	GILBERT ROBINSON	March 7, 1988
MANCE LIPSCOMB	RUTH BURRIS aka RUBY BURRIS	October 23, 1995
MANCE LIPSCOMB	ANNIE HALL	October 23, 1995
MANCE LIPSCOMB	ANNIE HALL; AS NEXT FRIEND, REP OR GUARDIAN OF MANCE LIPSCOMB J	October 23, 1995
MANCE LIPSCOMB BODYGLIN LIPSCOMB (BIRTH NAME) CRACKSHOT(NICKNAME)	GLEN ALYN (aka ALAN GLEN MYERS)	August 25, 1998
MARILYN MONROE; NORMA JEANE; NORMA JEANE DOUGHERTY; NORMA BAKER; CAROLE LIND	ANNA STRASBERG ADMINISTRATRIX C T A	January 27, 1994
MARILYN MONROE; NORMA JEAN; NORMA JEANNE; NORMA JEAN BAKER; NORMA JEAN MORTENSON	ESTATE OF LEE STRASBERG	December 21, 1987
MARILYN MONROE; NORMA JEAN; NORMA JEANNE; NORMA JEAN BAKER; NORMA JEAN MORTENSON	ESTATE OF MARILYN MONROE, ANNA STRASBERG, ADMINISTRATRIX	December 30, 1992
MARILYN MONROE; NORMA JEAN; NORMA JEANNE; NORMA JEAN BAKER; NORMA JEAN MORTENSON	ANNA FREUD CENTRE	January 27, 1988

MARION R. MORRISON aka JOHN WAYNE	WAYNE ENTERPRISES A CALIFORNIA LIMITED PARTNERSHIP	July 1, 1993
MARY KAY ASH	KATHLYN ELIZABETH KERR	March 3, 2003
MARY KAY ASH	ROSSLYN K ALEXANDER	January 31, 2003
MARY KAY ASH	MARY KAY INC	November 22, 2002
MAURICE (JOE) HUGHES aka JOE M HUGHES	C/O LAW OFFICE OF DAVID W SHOWALTER LLP	September 24, 2004
MICHAEL DAVID FULLER aka BLAZE FOLEY	MARSHA WELDON	August 15, 2006
MICKEY CHARLES MANTLE; MICKEY MANTLE; THE MICK; THE COMMERCE COMET; MICKEY; NO. 7	ESTATE OF MICKEY CHARLES MANTLE	June 13, 1996
MARY T. IVINS; MOLLY IVINS; MOLLY T. IVINS	THE TX DEMOCRACY FOUNDATION d.b.a. THE TEXAS OBSERVER	April 16, 2009
MARY T. IVINS; MOLLY IVINS; MOLLY T. IVINS	AMERICAN CIVIL LIBERTIES UNION FOUNDATION	April 27, 2009
MRS MARTIN WEEMS, MS MARIE A LIGON	MR DAVID IAN LIGON	June 10, 1997
OLIVER HARDY	LARRY HARMON PICTURES CORPORATION	March 8, 1994
OSWALD G NELSON OZZIE NELSON	DAVID NELSON	September 17, 1998
OSWALD G NELSON OZZIE NELSON	THE RICK NELSON COMPANY LLC	September 17, 1998
OSWALD GEORGE NELSON OZZIE NELSON	CARSEY-WERNER PRODUCTIONS LLC	July 27, 1998
PERCY LEO CROSBY; PERC; SKIPPY THE COMIC MASK OF HIS CREATOR; SKIPPY; SKIPPY'S DAD; SKIPPY'S ALTER EGO	JOAN CROSBY TIBBETS	August 27, 1990
PETER R SERRAO FKA PETER ROBERT JOSEPH SERRAO	KARL SERRAO	May 10, 2005
RICHARD PRYOR	JENNIFER LEE PRYOR	January 27, 2006
ROBERT C. KNIEVEL aka EVEL KNIEVEL	K & K PROMOTIONS, INC. (KELLY KNIEVEL)	January 22, 2009
ROBERT EARL DAVIS JR D J SCREW	IDA MAE DEARY	February 6, 2001

ROBERT EARL DAVIS JR D J SCREW	ROBERT EARL DAVIS SR	February 6, 2001
ROBERT PORTER WOOD SR, ROBERT P WOOD; BOB WOOD	FREDA JANE WOOD	October 31, 2003
ROBERT PORTER WOOD SR, ROBERT P WOOD; BOB WOOD	EUGENE THOMAS WOOD SR	October 31, 2003
ROY P BENAVIDEZ	HILARIA C BENAVIDEZ	November 13, 2000
ROYCE CLAY LEWIS JR; DR ROYCE LEWIS; DR LEWIS; ROYCE C LEWIS JR, MD	RONALD E LEWIS	June 22, 1994
ROYCE CLAY LEWIS JR; DR ROYCE LEWIS; DR LEWIS; ROYCE C LEWIS JR MD	RIKI LEWIS LONG	June 22, 1994
SELENA; SELENA QUINTANILLA; SELENA PEREZ	ABRAHAM QUINTANILLA JR	May 10, 1995
STEPHEN RAY VAUGHAN	JIMMIE VAUGHAN	August 20, 2001
STEVIE RAY VAUGHAN	THE ESTATE OF STEVIE RAY VAUGHAN, JIMMIE VAUGHAN AS SOLE EXECUTOR	September 7, 2004
TAMARA DE LEMPICKA; TAMARA	KIZETTE DE LEMPICKA FOXHALL	June 22, 1989
THOMAS JEFFERSON JACKSON STOUT JACKSON	JOHN SCOT LYON JACKSON	October 17, 2000
THOMAS JEFFERSON JACKSON STOUT JACKSON	JUDY A PETERSON	October 17, 2000
TILLMAN PARKER GOODAN AKA TILL GOODAN	BETTY GOODAN ANDREWS	October 8, 1991
WALTER MATTHAU	CWC INCORPORATED	September 10, 2004
WILLIAM AUSTIN HODGES Aka BILL Hodges	RITA ELAINE HODGES	July 14, 2008
WILLIAM BEN HOGAN	VALERIE FOX HOGAN AS INDEPENDENT EXECUTRIX OF THE ESTATE OF BEN HOGAN	July 30, 1998
WILLIAM BEN HOGAN	HARRIS METHODIST FORT WORTH A TEXAS NONPROFIT CORPORATION	July 11, 2002
WILLIAM BEN HOGAN	HARRIS METHODIST FORT WORTH A TEXAS NONPROFIT CORPORATION	November 3, 2006
WILLIAM HENRY PRATT, BORIS	SARA KARLOFF SPARKMAN	February 28, 1994

KARLOFF

WILLIAM SEWARD BURROUGHS

JAMES W GRAUERHOLZ

March 23, 1999

WILLIS NEWTON

DAVID BURLESON

August 28, 1997

Footnotes

^{a1} Of Counsel, Patterson & Sheridan, LLP. The author would like to thank Professor Paul Stancil of the College of Law at the University of Illinois, David Clark, Esq., and Jackob Ben-Ezra of the Texas Intellectual Property Law Journal for their invaluable assistance with substantive ideas and the editing of this article. This article is dedicated to my wife, Amy, and my children, Ella, Juliana, and Henry.

¹ See Rachel L. Swarns, Toy Company Retires Sasha and Malia Dolls, N.Y. Times, Feb. 3, 2009, at A20, available at <http://www.nytimes.com/2009/02/04/us/04dolls.html>; First Lady's Fury Forces Ty to Rename Sasha & Malia Dolls, Cleveland Leader, Feb. 4, 2009, <http://www.clevelandleader.com/node/8831>.

² Swarns, *supra* note 1 at A20.

³ See Elliot Blackburn, Lubbock Nears Deal on Holly Rights, Lubbock Online, Jan. 9, 2009, http://www.lubbockonline.com/stories/010909/loc_375424907.shtml.

⁴ *Id.*

⁵ Mike Graham, City approves \$20k contract for Buddy Holly naming rights, The Daily Toreador, Jan. 29, 2009, <http://media.www.dailytoreador.com/media/storage/paper870/news/2009/01/29/News/City-Approves.20k.Contract.For.Buddy.Holly.Naming.Righ-3602516.shtml>.

⁶ See J. Thomas McCarthy, Melville B. Nimmer and the Right of Publicity: A Tribute, 34 UCLA L. Rev. 1703, 1704 (1987) (“[T]he right of publicity is simply the inherent right of every human being to control the commercial use of his or her identity.”).

⁷ See *infra* notes 117-51 and accompanying text.

⁸ Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953). See Restatement (Third) of Unfair Competition §46 reporter’s note, cmt. b (1995) (crediting Haelan with being the first case to distinguish the rights of privacy and publicity).

⁹ Haelan, 202 F.2d at 867.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 868.

¹³ For a more in-depth discussion of the foundations of the right of publicity in privacy laws, see McCarthy’s discussion of Louis D.

Brandeis and Samuel D. Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) and Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203 (1954). McCarthy, *supra* note 6, at 1704-12.

¹⁴ William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960). See also Restatement (Third) of Unfair Competition §46 cmt. a (1995).

¹⁵ See, e.g., Restatement (Third) of Unfair Competition §46 cmt. b (1995) (“The principal historical antecedent of the right of publicity is the right of privacy.”).

¹⁶ For a summary of the development of the law of publicity from Haelan to the present, see Alan J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford --A Global Perspective on the Right of Publicity*, 15 Tex. Intell. Prop. L.J. 239, 247-49 (2007) and McCarthy, *supra* note 6.

¹⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-79 (1977).

¹⁸ See *id.* at 562.

¹⁹ *Id.* at 573.

²⁰ *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988).

²¹ *Id.* at 461.

²² *Id.* at 462.

²³ *Id.* at 463-64.

²⁴ *Id.* at 463.

²⁵ 978 F.2d 1093, 1099-100 (9th Cir. 1992).

²⁶ *Id.* at 1097.

²⁷ *Id.* at 1100-02.

²⁸ 698 F.2d 831, 836 (6th Cir. 1983).

²⁹ *Id.* at 835.

³⁰ 280 N.W.2d 129, 137-38 (Wis. 1979).

³¹ 447 F. Supp. 723 (S.D.N.Y. 1978).

³² Id. at 726-27.

³³ White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992).

³⁴ Id.

³⁵ Id.

³⁶ Id. at 1397 (citing California Civil Code §3344).

³⁷ Id. at 1397-99. For a discussion of the differences between the California common law right of publicity, California Civil Code §3344, and California's postmortem right of publicity statute as it existed at the time, see Stephen M. Lobbin, *The Right of Publicity in California: Is Three Really Greater Than One?*, 2 UCLA Ent. L. Rev. 157 (1995).

³⁸ Wendt v. Host Int'l, Inc., 125 F.3d 806, 806-11 (9th Cir. 1997).

³⁹ Id. at 810-12.

⁴⁰ 498 F.2d 821, 822 (9th Cir. 1974).

⁴¹ Id. at 822.

⁴² Id.

⁴³ Id. at 822-23.

⁴⁴ Id. at 827.

⁴⁵ See Lapter, *supra* note 16 at 259; Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 Marq. Sports L.J. 23, 63-65 (1999).

⁴⁶ N.Y. Civ. Rights Law §§50-51 (1992).

⁴⁷ See Paul Cirino, Note, *Advertisers, Celebrities, and Publicity Rights in New York and California*, 39 N.Y.L. Sch. L. Rev. 763, 771-78 (1994); Lapter, *supra* note 16 at 262-64.

⁴⁸ 124 F.2d 167, 170 (5th Cir. 1942).

⁴⁹ Id. at 168. O'Brien won the Heisman Trophy in 1938, and today the award for college football's top quarterback is named for him. See The Davey O'Brien Award - National Quarterback Award, <http://www.daveyobrien.com> (last visited Aug. 13, 2009).

⁵⁰ O'Brien, 124 F.2d at 167-68.

⁵¹ Id. at 167.

⁵² Id. at 169.

⁵³ Id. at 169-70.

⁵⁴ Id. at 170.

⁵⁵ Id.

⁵⁶ O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1942) (Holmes, J. dissenting).

⁵⁷ Id.

⁵⁸ Id. at 170 (majority opinion).

⁵⁹ U.S. Life Ins. Co. v. Hamilton, 238 S.W.2d 289, 292 (Tex. Civ. App.--Waco 1951, writ ref'd n.r.e.).

⁶⁰ See *id.* at 290.

⁶¹ Id. at 290-91.

⁶² Id. at 290.

⁶³ Id. at 292.

⁶⁴ Id. (citation omitted).

⁶⁵ Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. 1973).

⁶⁶ See Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719, 720 (Tex. Civ. App.--Eastland 1975, writ ref'd n.r.e.).

⁶⁷ Id.

⁶⁸ Id. at 721.

⁶⁹ Id.

70 Id.

71 Id. at 721(citing *Birmingham Broad. Co. v. Bell*, 68 So. 2d 314 (Ala. 1953), *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967), and *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485 (N.Y. 1952)).

72 Kimbrough, 521 S.W.2d at 720.

73 See *Meadows v. Harford Life Ins. Co.*, 492 F.3d 634, 638 (5th Cir. 2007); *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994); *Express One Int'l v. Steinbeck*, 53 S.W.3d 895, 900 (Tex. App.--Dallas 2001, no pet. h.).

74 *Meadows*, 492 F.3d at 638 (quoting *Moore v. Big Picture Co.*, 828 F.2d 270, 272 (5th Cir. 1987)).

75 Restatement (Second) of Torts §652C (1977).

76 Id. cmt. a.

77 The Restatement (Third) of Unfair Competition §46 (1995) also defines and provides insight into the scope of right of publicity protection.

78 *Nat'l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 535-36 (W.D. Tex. 1980). When Heloise died during the pendency of her suit, National Bank of Commerce, the executor of her estate, was substituted in as the party plaintiff.

79 Id. at 540.

80 *Elvis Presley Enters., Inc. v. Capece*, 950 F. Supp. 783, 788-89 (S.D. Tex. 1996), rev'd on other grounds, 141 F.3d 188 (5th Cir. 1998).

81 Id. at 801.

82 See Restatement (Third) of Unfair Competition §46, cmt. d (1995). Likewise, Tex. Prop. Code Ann. §26.002 (Vernon 2000), which covers the right of publicity for deceased individuals, discussed infra at note 209, provides for the protection of not only names and photographs, but also voices, signatures, and likenesses.

83 *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 589 (N.D. Tex. 1999).

84 Id.

85 See *id.*

86 Id. at 591.

87 Id.

88 Elvis Presley Enters., Inc. v. Capece, 950 F. Supp. 783, 801 (S.D. Tex. 1996), rev'd on other grounds, 141 F.3d 188 (5th Cir. 1998).

89 Id. (citing *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) and *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978)). The district court also found that the use of the name "The Velvet Elvis" for the bar was not an unauthorized commercial exploitation of the identity of Elvis Presley, but rather "represents an art form reflective of an era that Elvis helped to shape." Id. at 802.

"The velvet Elvis" became a coined phrase for the art of velvet paintings and was adopted by Defendants for this reason--not because of its identification with Elvis Presley. Elvis's association with velvet paintings was not a product of his own doing nor can it be considered a part the character or personality of Elvis that Plaintiff has the right to control. Unlike "Here's Johnny," this phrase is not the thumbprint, work product, or tangible expression of Elvis Presley's celebrity identity. The mere association of a phrase or expression with a celebrity without the intent or effect of exploiting his identity or persona is insufficient cause for a violation of publicity rights.

Id. The district court refused to enjoin the bar from using "The Velvet Elvis" as its name. Id. at 802-04. However, on appeal, the Fifth Circuit found that "The Velvet Elvis" service mark infringed Elvis Presley Enterprises' marks and enjoined the used of "The Velvet Elvis" as the bar name. Id. at 204-07. The Fifth Circuit did not address whether The Velvet Elvis also violated Elvis's right of publicity since the remedies that Elvis Presley Enterprises sought for trademark infringement were identical to the remedies it sought in its right of publicity claim. Id. at 205 n.8.

90 Matthews v. Wozencraft, 15 F.3d 432, 435-36 (5th Cir. 1994).

91 Id. at 438 (citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993)).

92 Id.

93 Id. at 439.

94 Id.

95 Id. at 440.

96 Matthews v. Wozencraft, 15 F.3d 432, 440-41 (5th Cir. 1994).

97 See, e.g., *infra* notes 143-148 for a discussion of *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341 (N.D. Tex. 1985), aff'd, 799 F.2d 1000 (5th Cir. 1986).

98 Restatement (Second) of Torts §652C cmt. b (1977).

99 Moreover, in adopting a right of publicity for deceased individuals, the Texas legislature did not limit actionable uses to commercial uses. See Tex. Prop. Code Ann. §26.011 (Vernon 2000) (stating that an individual's name, voice, signature, photograph, or likeness may not be used "in any manner" subject to limitations contained in other subsections).

100 Restatement (Second) of Torts §652C cmt. b, illus. 4, 5 (1977).

101 Id. cmt. c.

102 O'Grady v. Twentieth Century Fox Film Corp., No. 5:02 CV 173, 2003 WL 24174616 (E.D. Tex. Dec. 19, 2003).

103 Id. at *2.

104 Id.

105 Id.

106 Id.

107 Id.

108 O'Grady v. Twentieth Century Fox Film Corp., No. 5:02 CV 173, 2003 WL 24174616, at *2 (E.D. Tex. Dec. 19, 2003).

109 Id. at *2-3.

110 Id. at *3.

111 Id. at *4.

112 Id.

113 Id. at *1.

114 O'Grady v. Twentieth Century Fox Film Corp., No. 5:02 CV 173, 2003 WL 24174616, at *9 (E.D. Tex. Dec. 19, 2003). Discovery also argued that the use of O'Grady's name in conjunction with promotions for the movie were "exactly the kind of incidental use that the courts regularly allow." Id. However, the court found that the use of plaintiff's name was "meaningful and purposeful" and not "casual and incidental." Id. (distinguishing *Merle v. Sociological Research Film Corp.*, 152 N.Y.S. 829 (N.Y. App. Div. 1915) (finding no violation of New York statute where a motion picture showed a factory building with a sign with the plaintiff's name)).

115 Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 592-93 (N.D. Tex. 1999). The Court also rejected Dillard's argument that the use of Henley's name was incidental, in light of the fact that the creators had admitted that its use was designed to attract reader's attention. Id. at 594.

116 Id. at 592-93.

117 See Restatement (Third) of Unfair Competition §46 reporter's notes cmt. d (1995) ("Several cases indicate that the right of publicity is available only to plaintiffs who have achieved some degree of celebrity. However, non-celebrities should also be permitted to recover upon proof that the appropriated identity possessed commercial value.") (citations omitted).

118 828 F.2d 270, 271 (5th Cir. 1987).

119 Id. at 271.

120 Id.

121 Id.

122 Id.

123 Id. at 272.

124 *Moore v. Big Picture Co.*, 828 F.2d 270, 275 (5th Cir. 1987).

125 Id. at 276.

126 Id.

127 Id.

128 Id.

129 *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 WL 1940159, at *1-2 (Tex. App.--Austin Aug. 11, 2005, no pet. h.).

130 Id. at *1.

131 Id. at *2.

132 Id.

133 Id.

134 Id.

135 *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 WL 1940159, at *2 (Tex. App.--Austin Aug. 11, 2005, no pet. h.).

136 Id.

137 Id.

138 Id. at *4. Much of the discussion in *Topheavy* concerned whether the release signed by the plaintiff could be voided. *Id.* at *4-5.

139 Id. at *3.

¹⁴⁰ Id. (quoting Restatement (Second) of Torts, §652C cmt. b (1977)).

¹⁴¹ Topheavy Studios, Inc. v. Doe, No. 03-05-00022-CV, 2005 WL 1940159, at *8 (Tex. App.--Austin Aug. 11, 2005, no pet. h.).

¹⁴² Id. at *1, *8.

¹⁴³ Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341, 1359-60 (N.D. Tex. 1985), aff'd, 799 F.2d 1000 (5th Cir. 1986), cert. denied, 107 S. Ct. 1275 (1987).

¹⁴⁴ Id. at 1343.

¹⁴⁵ Id. at 1344.

¹⁴⁶ Id.

¹⁴⁷ Id. at 1359-61.

¹⁴⁸ Id. at 1360 (citing *Nat'l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 540 (W.D. Tex. 1980) and *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1210 (W.D. Va. 1981)).

The Faloona court's requiring Hustler's use to be "commercial" and to be designed to sell more magazines was likely unduly restrictive, as made clear by the Restatement of Torts; clearly the images used in the magazines had some "value," at least a nominal value, to Hustler, and they were used because of that value. This holding was likely unnecessary in light of the fact that the court found that releases signed by the parents afforded Hustler a complete defense to the children's claims. *Id.* at 1355. To the extent the court sought to discuss the children's right of publicity claims on the merits, the newsworthy exceptions or incidental use exceptions, discussed below, would likely have been more appropriate than dismissing the children's claims on the basis of the use being noncommercial, a questionable conclusion in its own right.

¹⁴⁹ *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994).

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² *Express One Int'l, Inc. v. Steinbeck*, 53 S.W. 3d 895, 897 (Tex. App.--Dallas 2001, no pet. h.).

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id. at 897, 900.

¹⁵⁶ Id. at 898.

157 Id. at 901.

158 Express One Int'l, Inc. v. Steinbeck, 53 S.W. 3d 895, 900 (Tex. App.--Dallas 2001, no pet. h.).
The Restatement (Third) of Unfair Competition suggests that only natural persons have a right of publicity. Restatement (Third) of Unfair Competition §46, reporter's note, cmt. d (1995).

159 Id.

160 Id. The Express One court properly recognized that the “value” requirement was not limited to commercial value. However, the court also properly recognized that Steinbeck was trying to damage Express One’s reputation, and not exploit it for its value. Had Steinbeck been opposed to the unionization effort and exploited Express One’s name in an attempt to give additional credibility to the anti-unionization campaign, the decision likely would have been different had Express One brought a claim against Steinbeck.

161 Id. Interestingly, Express One apparently did not sue Steinbeck for defamation.

162 Busch v. Viacom Int'l, Inc., 477 F. Supp. 2d 764, 769 (N.D. Tex. 2007).

163 Id.

164 Id.

165 Id. at 768.

166 Id. at 776-77 (citing *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994)). The court also found that dismissal would have been appropriate since parody is protected by the First Amendment. Id. at 777. The court’s holding on “public domain” grounds seems misplaced; although many images of celebrities may be in the “public domain” by virtue of their voluntarily appearances in public and on talk shows, at least to the extent that those images are not otherwise protected by copyright, such public access to such images does not give someone the right to use those images to promote commercial products. The stronger bases for dismissing Busch’s claim was likely that the Daily Show’s use did not appropriate Bush’s name for the value associated with it, and the use was a constitutionally protected parody, aimed at Pat Robertson rather than at Busch.

167 Id. at 777 n. 8 (emphasis in original).

168 Busch v. Viacom Int'l, Inc., 477 F. Supp. 2d 764, 777 n. 8 (N.D. Tex. 2007). (alteration in original).

169 Restatement (Second) of Torts §652C cmt. d (1977).

170 *Benavidez v. Anheuser Busch, Inc.*, 873 F.2d 102, 104 (5th Cir. 1989).

171 Id. at 103.

172 Id.

173 Id.

174 Id. at 104.

175 Id.

176 *Benavidez v. Anheuser Busch, Inc.*, 873 F.2d 102, 104 (5th Cir. 1989).

177 Id.

178 *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 638-39 (5th Cir. 2007).

179 Id.

180 Id.

181 Id.

182 Id.

183 Id. at 638.

184 *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 638-39 (5th Cir. 2007).

185 Id. (citing *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994)).

186 Id. at 437.

187 See also the rejection of “incidental” use arguments in *O’Grady* and *Henley*, discussed *supra* notes 114-115.

188 *O’Grady v. Twentieth Century Fox Film Corp.*, No. 5:02 CV 173, 2003 WL 24174616, at *10 (E.D. Tex. Dec. 19, 2003).

189 Id.

190 *Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 591 (N.D. Tex. 1999).

191 *Elvis Presley Enters., Inc. v. Capece*, 950 F. Supp. 783, 802 (S.D. Tex. 1996), *rev’d on other grounds*, 141 F.3d 188 (5th Cir. 1998).

192 Id. (citation omitted). This specific holding does not appear to have been reversed by the Fifth Circuit’s decision in *Elvis Presley Enters.*, 141 F.3d 188 (5th Cir. 1998).

193 Henley, 46 F. Supp. 2d at 595.

194 Topheavy Studios, Inc. v. Doe, 03-05-00022-CV, 2005 WL 1940159, at *2 (Tex. App.--Austin Aug. 11, 2005, no pet. h.)

195 Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341, 1360 (N.D. Tex. 1985), aff'd, 799 F.2d 1000 (5th Cir. 1986).

196 Id. at 1350.

197 Id. at 1352.

198 Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994).

199 See Restatement (Third) of Unfair Competition §46 cmt. d (1995) ("If a person can be identified by a real name, nickname, or professional name, or by a likeness embodied in a photograph, drawing, film, or physical look-alike.").

200 Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 596 (N.D. Tex. 1999)(citing Restatement (Second) of Torts §652C cmt. d (1977)).

201 O'Grady v. Twentieth Century Fox Film Corp., No. 5:02 CV 173, 2003 WL 24174616, at *10 (E.D. Tex. Dec. 19, 2003).

202 Id. at *11.

203 Id.

204 Henley, 46 F. Supp. 2d at 596.

205 Id.

206 Id. at 597.

207 See Restatement (Third) of Unfair Competition §46 cmt. h (1995) (citing what is now N.Y. Civ. Rights Law §50 (McKinney 1992); Mass. Gen Laws. Ann. ch. 214, §3A (West 2005); R.I. Gen. Laws §9-1-28 (1956); Wis. Stat. Ann. §995.50 (West 1998)). See also generally Kevin M. Fisher, Comment, *Which Path to Follow: A Comparative Perspective on the Right of Publicity*, 16 Conn. J. Int'l L. 95, 104 (2000).

208 Cal. Civ. Code §3344.1 (West 2000). See also Lapter, *supra* note 16, at 271-72 (discussing postmortem right of publicity in California and Tennessee).

209 See Tex. Prop. Code Ann. §26.001 et seq. (Vernon 2009).

210 Id. §26.002. The statutory provisions related to the right of publicity for deceased individuals do "not affect a right an individual may have in the use of the individual's name, voice, signature photograph, or likeness before the death of the individual." Id. §26.014.

211 Id. §26.003.

212 Id. §26.012(f).

213 Id. §26.004. Thus, in addition to creating a right of publicity for deceased individuals, the 1987 statute made it clear that living individuals may transfer the property right in their right of publicity to another individual or entity. This transferability distinguishes the right of publicity in Texas from simply being a subset of the right of privacy, making it akin to other types of intellectual property.

214 Id. §26.005 (detailing division of property rights among surviving spouses, children, and grandchildren).

215 Tex. Prop. Code Ann. §26.010 (Vernon 2009).

216 See Restatement (Second) of Torts §652C cmt. a (1977) (stating that the protection against the appropriation of name or likeness “is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it”).

217 Tex. Prop. Code Ann. §26.011 (Vernon 2009)(emphasis added).

218 Id. §26.012(a).

219 Id. §26.012(b).

220 Id.

221 Id.

222 Id. §26.012(c).

223 Tex. Prop. Code Ann. §26.013(a) (Vernon 2009). In *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 733-34 (N.D. Tex. 1997), the court rejected an argument that §26.013 did not create an independent cause of action for the heirs of a deceased individual: “Chapter 26 is intended to do more than ensure that successors to publicity rights of a deceased person are able to maintain common law causes of action against persons who abridge those rights.” Id.

224 See *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir. 1998) (holding that request for attorneys’ fees under the Lanham Act was not sufficient to preserve claim for attorney’s fees under the Texas right of publicity statute).

225 Tex. Prop. Code Ann. §26.006 (Vernon 2009). The registration form is available at www.sos.state.tx.us/statdoc/forms/3701.doc. The end of Appendix A includes the address of the Secretary of State for filing as well as a phone number for questions regarding the process.

226 Id. §26.007(a).

227 Id. §26.008(a).

228 Id. §26.008(b).

229 Id. §26.009. In *Mantle*, the defendant argued that an arbitration award to Mickey Mantle's family based on a right of publicity violation should be vacated because there was no evidence that the family had registered their claim to ownership of his publicity rights. *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 734 (N.D. Tex. 1997). The court refused to reverse the arbitration award, finding that even assuming arguendo that registration was a requirement for asserting a right of publicity claim within one year of a deceased individual's death, the award by the arbitration panel to the Mantles constituted no more than a mistake of law or fact, which did not justify a reversal of the award under the Federal Arbitration Act. *Id.*

230 Office of the Texas Secretary of State; Appendix B. By the end of 1988, they were joined on the rolls by Jack Webb, Mae West, Boris Karloff, Jimmy Durante, Louie Armstrong, Bela Lugosi, Harpo Marx, Charlie Chaplin, Bing Crosby, Albert Einstein, Johnny Weissmuller, Clark Gable, and Betty Grable.

231 *Id.*

232 *Id.*

233 Tex. Prop. Code Ann. §26.012(d) (Vernon 2009).

234 See generally Restatement (Third) of Unfair Competition §46 cmt. h (1995); Cal. Civ. Code §3344.1(g) (West 2000) (seventy years). Kentucky and Nebraska also limit the post-mortem right of publicity to fifty years. See Ky. Rev. Stat. Ann. §391.170(2) (West 1984); Nev. Rev. St. §597.790(1) (1995). Other states have different time limits; for example, Indiana's and Oklahoma's rights of publicity last one hundred years after death, Ind. Code §32-36-1-8 (200); Okla. Stat. tit. 12, §1448(g) (1993), while Virginia's lasts only twenty years after death, Va. Code Ann. §8.01-40 (West 1977).

235 *King v. Ames*, 179 F.3d 370, 372 (5th Cir. 1999).

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.* at 376-77.

240 *Id.* at 377. See also *Brown v. Ames*, 201 F.3d 654, 661-62 (5th Cir. 2000) (upholding damages award for use of plaintiffs' names and likenesses in conjunction with marketing of recordings where damage award was based on "inferences from the amounts appellees were paid to perform at blues festivals").

241 *Nat'l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 546-47 (W.D. Tex. 1980).

242 *Id.*

243 *Id.* at 547.

244 Id.

245 See, e.g., U.S. Life Ins. Co. v. Hamilton, 238 S.W.2d 289, 292-94 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.).

246 Tex. Prop. Code Ann. §26.013(a)(3) (Vernon 2000). In *Mantle*, the court upheld the arbitration panel's award of exemplary damages. *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 734 (N.D. Tex. 1997). The case does not indicate what evidence supported the exemplary damages award.

247 Tex. Civ. Prac. & Rem. Code Ann. §41.003(a) (Vernon 2008). “Fraud” means fraud other than constructive fraud.” §41.001(6). “Malice” means a specific intent by the defendant to cause substantial injury or harm to the claimant.” §41.001(7). “Gross negligence” means an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.” §41.001(11).

248 *Moore v. Big Picture Co.*, 828 F.2d 270, 277 (5th Cir. 1987).

249 *Nat'l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 548 (W.D. Tex. 1980).

250 *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1105 (9th Cir. 1992). The California Civil Code defined “malice” in pertinent part as “despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” *Id.* at 1104 (quoting what is now Cal. Civ. Code §3294(c)(1) (West 1997)) (emphasis in original).

251 *Id.* at 1105.

252 Tex. Prop. Code Ann. §26.013(a) (Vernon 2000).

253 See Tex. Civ. Prac. & Rem. Code Ann. §38.001 (Vernon 2008). If a plaintiff had actually “rendered services” or “performed labor” for a defendant prior to the misappropriation of their name or likeness, or if the misappropriation was also accompanied by a breach of contract, it is possible that a colorable claim for attorney’s fees could be plead, though the harm from the tort of misappropriation of name or likeness could be wholly different from the harm from the breach of contract or failure to pay for rendered services or performed labor.

254 *Daboub v. Gibbons*, 42 F.3d 285, 286 (5th Cir. 1995).

255 *Id.*

256 *Id.* at 289 (second alteration in original) (citation omitted).

257 *Brown v. Ames*, 201 F.3d 654, 655 (5th Cir. 2000).

258 *Id.* at 658.

259 *Id.* at 658-59.

260 Id. at 658 (citations omitted).

261 Id. at 660.

262 *Chavez v. Arte Publico Press*, 59 F.3d 539, 540 (5th Cir. 1995), rev'd on other grounds, 204 F.3d 601 (5th Cir. 2000).

263 Id. at 541.

264 Id.

265 Id.

266 Id.

267 Id. at 546. This holding was later reversed by the Fifth Circuit in *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

268 *Chavez v. Arte Publico Press*, 59 F.3d 539, 547 (5th Cir. 1995), rev'd on other grounds, 204 F.3d 601 (5th Cir. 2000).

269 Id. at 547.

270 *Jimenez v. Conley Magazine*, L.L.C., No. SA-06-CA-1013-XR, 2006 WL 3716649, at *1 (W.D. Tex. Dec. 14, 2006).

271 Tex. Civ. Prac. & Rem. Code Ann. §101.0215 (Vernon 2005).

272 *Jimenez*, 2006 WL 3716649, at *2 (citing Tex. Civ. Prac. & Rem. Code §101.057).

273 *Chang v. Virgin Mobile USA*, L.L.C., No. 3:07-CV-1767-D, 2009 WL 111570 (N.D. Tex. Jan. 16, 2009).

274 See Plaintiffs' First Amended Petition PP 1, 13, No. 3:07-CV-1767-D, 2009 WL 111570 (Jan. 16, 2009).

275 Plaintiffs' First Amended Petition, *supra* note 274, P 13.

276 See *Chang*, 2009 WL 111570, at *1.

277 Id.

278 Virgin's U.S. affiliate and other defendants were voluntarily dismissed by *Chang*. *Id.* at *1 n. 2.

279 *Id.* at *1.

280 Plaintiffs' First Amended Petition, *supra* note 274, PP 17-18.

281 See Chang, 2009 WL 111570, at *3-5.

282 See *id.* at *5-7.

283 *Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d 895, 900 (Tex. App.--Dallas 2001, no pet. h.).

284 *Id.*

285 Restatement (Second) of Torts §652C cmt. a (1977) (emphasis added).

286 *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (emphasis added).

287 Tex. Prop. Code Ann. §26.002 (Vernon 2000) (emphasis added).

288 See *supra* notes 13-15.

289 *White v. Samsung Elecs. Am.*, 971 F.2d 1395, 1397 (9th Cir. 1992).

290 *Id.*

291 *Id.* at 1399.

292 *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 638 (5th Cir. 2007); *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994); *Express One Int'l v. Steinbeck*, 53 S.W.3d 895, 900 (Tex. App.--Dallas 2001, no pet. h.).

293 Restatement (Second) of Torts §652C cmt. a (1977) (emphasis added).

294 Restatement (Third) of Unfair Competition §46 (1995) (emphasis added).

295 *Id.* cmt. c.

296 Tex. Prop. Code Ann. §26.002 (Vernon 2000).

297 *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974).

298 *Midler v. Ford Motor Co.*, 849 F.2d 460, 461-62 (9th Cir. 1988); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097-98 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993).

299 *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 595 (N.D. Tex. 1999).

³⁰⁰ Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983); Elvis Presley Enters., Inc. v. Capece, 950 F. Supp. 783, 801 (S.D. Tex. 1996), rev'd on other grounds, 141 F.3d 188 (5th Cir. 1998).

³⁰¹ See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1404 (Alarcon, J., dissenting) (arguing that in Motschenbacher, Midler, and Carson: "The commercial advertisements in each case showed attributes of the plaintiff's identities which made it appear that the plaintiff was the person identified in the commercial. No effort was made to dispel the impression that the plaintiffs were the source of the personal attributes at issue. The commercials affirmatively represented that the plaintiffs were involved.").

³⁰² Id. at 1405 (Alarcon, J., dissenting).

³⁰³ Id. at 1399 (majority opinion).

³⁰⁴ Id. at 1397.

³⁰⁵ See id. at 1405 (Alarcon, J., dissenting) ("I quite agree that anyone seeing the commercial advertisement would be reminded of Vanna White.... But the fact that an actor or actress became famous for playing a particular role has, until now, never been sufficient to give the performer a proprietary interest in it.").

³⁰⁶ Cf. Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (upholding right of publicity claim based on a drawing resembling Muhammad Ali and reference to "the Greatest"), discussed *supra* notes 31-32.

³⁰⁷ U.S. Life Ins. Co. v. Hamilton, 238 S.W.2d 289, 292 (Tex. Civ. App.--Waco 1951, writ ref'd n.r.e.) ("The use of an individual's signature for business purposes unquestionably constitutes the exercise of a valuable right of property in the broadest sense of that term.").

³⁰⁸ Id. at 294 (awarding plaintiff \$1 in nominal damages where letters including plaintiff's signature were likely sent out inadvertently and plaintiff showed no actual damages).

³⁰⁹ Moore v. Big Picture Co., 828 F.2d 270, 276 (5th Cir. 1987).

³¹⁰ Topheavy Studios, Inc. v. Doe, . 03-05-00022-CV, 2005 WL 1940159, at *2 (Tex. App.--Austin Aug. 11, 2005, no pet. h.). Of course, the second element requires only that the plaintiff "can be identified from the publication," *id.* at *3 (emphasis added), not that the plaintiff is actually identified by members of the public.

³¹¹ *Id.* at *1 ("[T]his Red-Hot Trivia Challenge lets you play with over 60 smokin' coeds during Spring Break Insanity, as they proudly show off their 'assets' for your personal enjoyment.").

³¹² It is assumed for the purpose of this hypothetical that the software developer obtained permission to use the photo from the owner of the copyright in the photo.

³¹³ Claims such as these could also be dismissed because the use of individual's images in these examples is incidental. See Meadows v. Hartford Life Ins. Co., 492 F.3d 634 (5th Cir. 2007). To the extent any liability for a violation of a right of publicity would be appropriate, nominal damages, like those awarded in Hamilton, would be appropriate. See Hamilton, 238 S.W.2d at 293-94.

³¹⁴ See Chang v. Virgin Mobile USA, LLC, 3:07-CV-1767-D, 2009 WL 111570, *1 (N.D. Tex. Jan. 16, 2009). However, one of Chang's friends did recognize her in the advertisement while visiting Australia, and e-mailed Chang about the ad. *Id.*

315 Chang alleged in her complaint that “Virgin Mobile … defamed Alison by encouraging, through innuendo, those who viewed the campaign to end their friendship with anyone that bears a resemblance to Alison.” See Plaintiffs’ First Amended Petition, supra note 274, P 27.

316 See supra note 295.

317 See Elliot Blackburn, Lubbock Nears Deal on Holly Rights, Lubbock Online, Jan. 9, 2009, http://www.lubbockonline.com/stories/010909/loc_375424907.shtml.

318 *Id.* In the article, Professor Wes Cochran from Texas Tech University was quoted as indicating that it was unclear whether the legislature intended for the publicity rights of all individuals to expire after fifty years: “Most people’s publicity will fade after fifty years.... It’s truly with the people like Buddy Holly, where it doesn’t, that the uncertainty lies.” *Id.*

319 Tex. Prop. Code Ann. §26.012(d) (Vernon 2000).

320 *Id.* §26.012(f).

321 *Id.* §26.014.

322 See The Official Site of James Dean FAQ, <http://www.jamesdean.com/siteinfo/faq.html> (last visited Aug. 18, 2009).

323 See Trademark Reg. Nos. 1440661, 1483345, 1480606, 1480617, 1492324, 1494200, 1496806, 1640142, 1861230, available at <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=4004:k60svl.1.1> (last visited Aug. 18, 2009).

324 Ind. Code Ann. §32-36-1-8 (West 2002).

325 *Id.* §§32-36-1-1 to -20. One commentator has indicated that CMG Worldwide was influential in Indiana’s adoption of its broad right of publicity statute in 1998. Lapter, *supra* note 16, at 266. In light of the Texas legislature’s explicit statement that an individual’s name and likeness may be used for any purpose after fifty years, someone facing such a claim in Indiana would seem to have a strong argument that to the extent any damages from the use occurred in Texas, the plaintiff should not be able to recover for that portion of the damages.

326 A number of cases applying federal trademark law have found picture marks to be confusingly similar to word marks describing the pictured item. See, e.g., *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254 (2d Cir. 1987) (holding that Mobil Oil’s “flying horse” design mark was infringed by the word mark “Pegasus”); *Beer Nuts, Inc. v. King Nut Co.*, 477 F.2d 326 (6th Cir. 1973) (holding that nuts with picture of beer stein infringed “Beer Nuts” mark), cert. denied, 414 U.S. 858 (1973); *Jockey Int’l, Inc. v. Butler*, 3 U.S.P.Q.2d 1607 (T.T.A.B. 1987) (holding that a picture of a jockey riding a horse was confusingly similar to the word mark “Jockey”); *Arrow-Hart, Inc. v. Yazaki Corp.*, 169 U.S.P.Q. 249 (T.T.A.B. 1971) (holding that picture of arrow was confusingly similar to word mark “Arrow”); see generally 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §23:27 (4th ed. 2008).

327 See Trademark Reg. Nos. 3167408-11, available at <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=4004:k60svl.1.1> (last visited Aug. 19, 2009).

328 See Application Serial No. 77429631, and Trademark Reg. Nos. 3655631, 3658977, 3658978, and 3659071, available at <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=4004:k60svl.1.1> (last visited Aug. 19, 2009).

³²⁹ 179 F.3d 370, 376-77 (5th Cir. 1999).

³³⁰ Tex. Prop. Code Ann. §26.013(a) (Vernon 2000).