

# THE PRESIDENTIAL RIGHT OF PUBLICITY

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## I. INTRODUCTION

Although the right of publicity has historically been a cause of action invoked by celebrities to protect themselves from an extensive range of conduct, the question remains whether non-traditional celebrities deserve the same rights. [2] Can President Obama protect against the unauthorized use of his image since he has arguably attained celebrity-like status? I believe the answer is, to modify the President's campaign mantra, "Yes [He] Can." This Essay briefly discusses the application of the right of publicity to President Obama and concludes with suggestions on how he should protect that right.

As evidenced by the multi-million dollar industry surrounding celebrity endorsements and merchandise, image is a celebrity's most valuable asset. [3] While some may cringe when they see celebrities shill a particular product, it is difficult to argue that celebrities deserve no compensation for the use of their names or images in advertisements since that image often requires time and expenditures to develop. Indeed, the sole reason advertisers use a celebrity's image is its utility as an effective marketing tool. Also, if a celebrity's image was built around being wholesome, it is unclear why they should be denied the right to control how their images are used. If a celebrity has the right to control the when, where, and cost of using their image, celebrity-politicians should not forfeit these rights solely because they enter office.

## II. AN OVERVIEW OF THE RIGHT OF PUBLICITY

### A. *The Right*

Characterized as "a self-evident legal right, needing little intellectual rationalization to justify its existence," [4] the right of publicity has been defined in various ways over the years. [5] While the Eleventh Circuit has defined this right as "a celebrity's right to the exclusive use of his or her name and likeness," [6] the Ninth Circuit has taken a more expansive view and found that this right is "the inherent right of every human being to control the commercial use of his or her identity." [7] At its core, the right protects an individual's identity from being misappropriated by another for commercial use. [8] In this respect, it is similar to the way trademark law protects a business's name and logo. [9] However, the right of publicity is a distinct intellectual property right with its own common law and statutory development. A claimant asserting this right is less concerned with the use of their name or image as with deciding when and where it is used and how much they will be compensated for its use. [10] As of 2006, twenty-four states recognize a right of publicity under common law, while eighteen states recognize it under statute. [11] In California for example, a plaintiff must show four elements: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. [12] Although the policy justifications underlying the right of publicity claim vary by jurisdiction, general rationales include protecting an individual's interest in personal dignity and autonomy, securing commercial value of a plaintiff's fame and preventing unjust enrichment of others seeking to appropriate that value for themselves, prohibiting unauthorized commercial exploitation of one's identity and preventing harmful or excessive commercial use that may dilute the value of their identity, and affording protection against false suggestions of endorsement or sponsorship. [13]

### B. *Remedies*

The remedies available under a right of publicity claim vary by state law, but injunctive relief is common. Money damages may also be appropriate in certain circumstances. Although mental distress and anguish are normally associated with the right of privacy, a sympathetic jury in a right of publicity claim may believe a plaintiff's testimony regarding their mental distress or anguish and award monetary damages.

For example, the singer Tom Waits was a staunch critic of commercial endorsements. When he heard an advertisement on the radio that sounded like him, he was shocked, angry, and embarrassed and was awarded over \$200,000 in damages for the infringement of his right to publicity.[14]

In the typical right of publicity case, however, the plaintiff's award of money damages will be based upon the plaintiff's commercial injury. Damages primarily take one of three forms. First, the value of the damages can be assessed through the market value of the non-permitted use by comparing the use to the plaintiff's other licensing deals or what a person similarly situated would have paid under the same type of licensing arrangement. [15] Second, the value can be calculated by the loss of future potential earnings in the plaintiff's career or other licensing opportunities. Damages for loss of future earnings are potentially large because the unauthorized use interferes with the plaintiff's ability to control their image, which may become substantially altered or distorted. Finally, the plaintiff may recover the value of the infringer's profits, [16] which are based in trademark and copyright law. [17]

### *C. Politicians and the Right of Publicity*

Although politicians rarely bring right of publicity actions, that does not mean they are actually barred from bringing them. Perhaps one explanation for the infrequency is that "Most politicians just let this kind of thing slide, [ ... ] for public relations issues." [18] Other possible explanations for politicians not bringing these claims include politicians not wanting to invest in the resources to bring such claims, not wanting to appear overly sensitive, and the uncertainty as to whether and to what extent the First Amendment protects the sale of products bearing their images. [19] Despite the disincentives to bring these claims, however, the right of publicity has been raised in connection with the use of President Obama's image. A White House spokeswoman stated: "Our lawyers are working on developing a policy that will protect the presidential image while being careful not to squelch the overwhelming enthusiasm that the public has for the president." [20] This implied assertion of the President's right of publicity should not seem completely surprising since this would not be the first time a politician has attempted to assert a right of publicity claim.

In the 1970s, former Vice President Spiro Agnew asserted this right after the use of his image evolved from mild parody into more pointed attacks. In that case, watches were sold bearing a caricature of an Uncle Samesque Agnew with a gloved minute hand forming a peace-sign. [21] Originally intended as a parody of the iconic Mickey Mouse watch, the Agnew watch spawned an entire industry of products bearing the former Vice President's likeness. Initially, Agnew took the lampooning in good stride and simply asked that the watch's manufacturer donate a portion of the profits to a charity of his choosing. [22] However, once a dartboard emerged bearing Agnew's likeness with the words "Et Tu Spiro" beneath it, [23] Agnew's lawyers claimed this use was an invasion of the former Vice President's right to privacy. [24] The dartboard's manufacturer contended that the use of Agnew's likeness was protected by the First Amendment as a legitimate satire of a public figure. The parties settled the case before these opposing claims could be decided by a court.

Similarly, in 1999, Governor Jesse Ventura sought to assert his right of publicity by sending cease and desist letters to the producer of a Valentine's Day card "featuring a grinning likeness of [the Governor], clad in a wrestling leotard with pink hearts and wrapped in a pink feather boa." [25] No complaint or legal action was filed since the card producer complied with Ventura's desist letter. [26]

A few years later, Governor Arnold Schwarzenegger sued a company selling a machine gun-toting bobblehead doll made in his image. [27] Schwarzenegger claimed the doll's manufacturer was exploiting the value of his image, thereby violating his right of publicity. Again, the manufacturer maintained this use was a legitimate expression of his First Amendment rights. Many hoped the case would set precedent regarding how these rights should be balanced. [28] Unfortunately, like the Agnew case, Schwarzenegger and the manufacturer settled before the court could provide the much-needed precedent. [29]

While it is true that both Ventura and Schwarzenegger had the right of publicity before entering office

due to their prior status as celebrities, the justification for them to protect that right while in office remains the same. [30] In addition, Ventura and Schwarzenegger's cases, along with Agnew's, underscore the tension between protecting a celebrity-politician's image against commercial exploitation and the First Amendment rights of the public to use that image.

Given the extraordinary interest in President Obama, the time is ripe for this issue to be decided in favor of a celebrity-politician having an explicit right of publicity. As will be discussed more fully below, the reasoning for President Obama to assert this right is three-fold. First, there is a crucial distinction between commercial exploitation and freedom of expression and those exploiting President Obama's name or image should not be allowed to use the First Amendment to shield their commercial activities. Second, celebrity-politicians have a property interest in their image and deserve to enjoy the fruits of their labor in cultivating that image. Finally, if celebrity-politicians must wait until after they retire from public service to bring a right of publicity claim, they will likely be barred by the statute of limitations.

### III. THE CASE FOR PRESIDENT OBAMA

#### *A. The Line between Free Speech and Commercial Exploitation*

The scope and application of First Amendment protection depends on whether the speech is commercial or non-commercial. [31] The use of a politician's image generally receives greater First Amendment protection than the use of a celebrity's image, and courts have held that parodies, satires, and other forms of free speech exceptions to the right of publicity apply to a greater extent to politicians than to celebrities. [32] Non-commercial speech receives greater First Amendment protection because this type of speech is more likely to facilitate the dissemination of information and ideas and bring about political and social change desired by the public. [33] Courts have generally taken different approaches to determine when expression under the First Amendment takes precedence over the right of publicity by examining whether the defendant's use is commercial, whether the use is a parody, whether the use is transformative, and whether the predominant purpose of the use is commercial or expressive. [34] Even though non-commercial speech receives enhanced protection, it may nonetheless fall before a strong right of publicity claim.

While it is true that when politicians take office they must bear "the white light that beats upon a throne," [35] there is a clear difference between freedom of expression--like non-commercial speech--and the pure, commercial exploitation of another's likeness. For example, the First Amendment is hardly invoked by a film company's use of Bella Lugosi's likeness as Count Dracula in plastic toy pencil sharpeners, soap products, candy dispensers, and beverage stirring rods. [36] Similarly, products like the "Obama Yes, We Can Opener" [37] and "Obama Fingers" [38] serve no legitimate First Amendment purpose. As "commercial speech," this use would receive the lowest level of protection under the First Amendment [39] because its purpose is to promote the sale of goods rather than to facilitate the exchange of ideas. Notably, even when an advertisement contains some "newsworthy" information, it may nonetheless be classified as commercial speech because it is still an advertisement. [40] Moreover, the Supreme Court has held that content-based restrictions on advertisements may be permissible given the greater potential for deception or confusion in the context of certain advertising messages. [41] Thus, because this kind of commercial speech is not strongly protected, it is often trumped by the right of publicity.

Consequently, the sellers of these types of products should be required to pay for the exploitation of President Obama's name or image. To the extent that the First Amendment should not be used to shield the commercial use of Lugosi's likeness to sell plastic pencils or stirring rods, it should likewise not be used to shield sellers of unauthorized commercial products bearing Obama's likeness. [42] In short, those who sell unauthorized products bearing Obama's likeness should not be permitted to hide behind the protection of the First Amendment simply because the person they have chosen to exploit happens to be a politician. [43]

#### *B. Politicians Are Entitled to Profit From Their Labor*

According to John Locke's labor theory of property, "[t]he labor of his body and the work of his hands ... are properly his." [44] President Obama has invested a lot of time, money, and effort in building his image and, like other celebrities, his labor has created a valuable interest no less deserving of protection. [45]

Right of publicity law recognizes that much of its economic value "lies in the 'right of exclusive control over the publicity.'" [46] Judge Kozinski's infamous dissent in *White v. Samsung Electronics America (White II)*, attempted to rebut the use of Locke's labor theory to justify the right of publicity on the ground that celebrities' identity are not solely their own creation--others such as writers, directors, or producers may also help create that valuable interest in the celebrities' identify. [47] Critics of President Obama's right of publicity might follow Kozinski's reasoning to argue that that thousands, if not millions of people, have created the value of Obama's image and thus Obama should not be the sole beneficiary of the fruits of others' labor. However, participation by others does not justify denying him exclusive control of this "jointly" created image. In fact, this "participation of others" argument actually supports the use of Locke's labor theory. As has been noted, "[t]he costs of obtaining permission from all [would be] co-owners is too high, so unilateral property claims must be permitted if individuals are to make good use of the resources they come across." [48]

Although most public servants do not usually try to profit from the commercial use their images while they are in office, they may still hope to "make good use" of their fame after they leave office. That President Obama has entered the realm of politics, however, does not mean he has forfeited his property rights, including his right of publicity. [49] While the President should not be endorsing Pepsi or Nike during the state of the union address, his ability to market himself after he leaves office will be greatly diminished if he cannot assert his right of publicity until he retires. By contrast, those who appropriate the President's image to sell their products are reaping what they have not sown and allowing them to receive a benefit without having expended the corresponding labor is a clear case of unjust enrichment. As the Supreme Court has noted, preventing unjust enrichment is the primary basis for right of publicity protection. [50]

### C. Use It or Lose It

If President Obama is unable to enforce his right of publicity until after he leaves office, it is likely that he will be barred from bringing any claims which arose while he was in office. Most states that have ruled on the issue have held that a right of publicity claim must be brought within one to two years of its accrual. [51] Many states arrived at this conclusion by applying their respective statutes of limitations for libel, slander, or the invasion of privacy. [52] Other states, however, have looked to different areas of law to determine the appropriate limitations period for a right of publicity claim. For example, New Jersey has applied a six-year property statute of limitations for actions based on the tort of the right to privacy. [53]

A super majority of States currently follow the "single publication rule" with respect to when a right of publicity claim accrues for statute of limitations purposes. [54] Under this rule, each edition of a newspaper, book, magazine, or radio or television broadcast, gives rise to only one claim regardless of how many people read, hear, or view the publication. [55] Although the rule was originally developed for defamation cases, courts have applied it to right of publicity cases involving the use of identity on products. Therefore the statute of limitations clock starts running with the very first publication or use of the image. [56] In addition, this rule dictates that only one lawsuit in a single court may be based upon that publication or use and thus one lawsuit covers *all* of the resulting damages. [57] This rule has serious implications on the window of opportunity for President Obama to bring a right of publicity claim because failing to bring his claim within the statute of limitations period arising from the first use means he will be barred from recovering any additional damages resulting from subsequent uses.

Determining how long the President has to bring a right of publicity claim involves a choice of law question and is crucial to the outcome of such a claim. Unfortunately, only a few right of publicity cases

have engaged in a choice of law analysis [58] because the choice of law issue is frequently ignored by the parties [59] or because only the forum state had an interest in the controversy. Even when the interests of several states are implicated, however, there is a tendency to automatically apply the forum state's law. [60] "Under traditional choice of law principles, the law of the forum governs on matters of procedure"--which includes the statute of limitations. [61] As a result, courts will likely apply the statute of limitations of the forum state, not the state in which the injury occurred or the state in which the plaintiff lives.

Forcing the President to wait until he leaves office to bring his claims will only encourage forum shopping in states like New Jersey, which has a longer statute of limitations. If longstanding public policy discourages plaintiffs from shopping for a favorable forum, [62] then it makes little sense to encourage the "leader of the free world" to engage in this activity. Furthermore, if the President does not forum shop, most states will only give him one or two years after a cause of action arises to bring his right of publicity claim (which has arguably already occurred). Therefore, because of the interplay between the statute of limitations, the single publication rule, and choice of law principles, unless Obama is allowed to pursue a right of publicity claim prior to leaving office, he will be completely barred from bringing this claim.

#### IV. CONCLUSION

Before President Obama embarks on a right of publicity claim, he should be careful not to wield it with a heavy-hand or to vigorously attack infringers. Rather, this right ought to be used as a shield to protect against false advertising, fraud, or similar conduct. However, if by not enforcing his right in a timely fashion President Obama has implicitly authorized the use of his image or will be barred by the forum state's statute of limitations from bringing his claim, then using the right as a sword while he is still in office would not only be appropriate, it would be unavoidable.

Moreover, just as there is something distasteful about a politician peddling a commercial product while in office, there is also something inappropriate about the idea of tasking White House Counsel or any other government-paid lawyers with the pursuit of claims that are solely for Obama's personal benefit. If President Obama decides to exercise his right to pursue these claims, it would be improper for him to have tax-payers foot the bill. Instead, he should retain private counsel to represent him as any other celebrity would do.

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[2]. *See, e.g.*, *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397-99 (9th Cir. 1992) (*White I*) (noting that the right of publicity protection extends not only to the name, likeness, voice and signature of a famous person, but also to anything that evokes that person's identity).

[3]. *See, e.g.*, CNNMONEY.COM, TOP 10 ENDORSEMENT SUPERSTARS, [HTTP://MONEY.CNN.COM/GALLERIES/2007/FORTUNE/0711/GALLERY.ENDORSEMENTS.FORTUNE/INDEX.HTML](http://money.cnn.com/galleries/2007/fortune/0711/gallery.endorsements.fortune/index.html) (LAST VISITED OCT. 28, 2009) (REPORTING THAT PROFESSIONAL GOLFER TIGER WOODS EARNED A STAGGERING \$100 MILLION DOLLARS FROM ENDORSEMENTS IN 2007).

[4]. J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1.1[B][2], at 1-5 (1992).

[5]. *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125, 130 n.13 (1993); *See also* *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981) (providing an extensive list of cases defining the right of publicity).

[6]. Martin Luther King, Jr., *Ctr. for Soc. Change, Inc. v. Am. Heritage Prod., Inc.*, 694 F.2d 674, 676 (11th Cir. 1983) (citing *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975); *Estate of Presley*, 513 F. Supp. at 1353).

[7]. *Miller v. Glenn Miller Productions, Inc.*, 318 F. Supp. 2d 923, 933, n.6 (C.D. Cal. 2004) (citations omitted) *aff'd in part*, 454 F.3d 975 (9th Cir. 2006).

[8]. For a more thorough discussion of the right of publicity, see Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (COMPARING THE RIGHT OF PRIVACY, AS SET FORTH IN LOUIS BRANDEIS & SAMUEL WARREN, THE RIGHT OF PRIVACY, 4 HARV. L. REV. 183 (1890), WITH THE IDEA OF A CELEBRITY'S RIGHT OF PUBLICITY).

[9]. Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1127 (1994)).

[10]. *Lerman v. Flint Distrib. Co.*, 745 F.2d 123, 134 (2d Cir. 1984).

[11]. *See Thomas Phillip Boggess V*, 31 Causes of Action 2d 121 §§ 5, 47 (2008).

[12]. *Hilton v. Hallmark Cards*, 580 F.3d 874, 889 (9th Cir. 2009) (citing *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001)).

[13]. *See Surina Mann, C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.: The First Amendment Versus the Right of Publicity in the Eighth Circuit*, 31 Hastings Comm. & Ent. L.J. 303, 307 (2009) (discussing the history and policy underpinnings of the right of publicity); Restatement (Third) of Unfair Competition § 46 cmt. c (1995).

[14]. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098, 1103 (9th Cir. 1992).

[15]. Matthew Savare, Comment, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA Ent. L. Rev. 129, 152-54 (2004).

[16]. *See, e.g., Lemon v. Harlem Globetrotters Int'l*, 437 F. Supp. 2d 1089, 1103 (D. Ariz. 2006) (noting that for right of publicity claims in Arizona, "the plaintiff may recover the proportion of the defendant's net profits that is attributable to the unauthorized use.") (citing Restatement (Third) of Unfair Competition § 49, cmt. d (1995)).

[17]. *See* 15 U.S.C. § 1117(a) (2008) (Trademark); 17 U.S.C. § 504(b) (2004) (Copyright).

[18]. *See* Stephanie Francis Ward, *Bobblehead has 'Governator' Blowing His Top*, 19 ABA J. E-Rep. 3 (2004) (quoting David Aronoff, a copyright defense lawyer).

[19]. Jacqueline D. Lipton, *Who Owns "Hillary.com"? Political Speech and the First Amendment in Cyberspace*, 49 B.C. L. Rev. 55, 79 (2008).

[20]. Julianna Goldman, *White House Lawyers Look to Limit Commercial Use of President*, Bloomberg.com, Jan. 30, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aY4JojiQVy4c> (quoting White House spokeswoman Jen Psaki).

[21]. *Time for Spiro*, TIME, JULY 6, 1970, AVAILABLE AT <HTTP://WWW.TIME.COM/TIME/MAGAZINE/ARTICLE/0,9171,878370,00.HTML?PROMOID=GOOGLEPP>.

[22]. Mike Anton, *Hale. E. Dougherty, 71: Doctor Co-Created Spiro Agnew Watch*, L.A. TIMES, JAN. 1, 2003, AT B-13, AVAILABLE AT <HTTP://ARTICLES.LATIMES.COM/2003/JAN/01/LOCAL/ME-DOUGHERTY11>.

[23]. Albert F. Smith & Lionel S. Sobel, *The Mickey Mouse Watch Goes to Washington: Would the Law Stop the Clock?*, 62 TRADEMARK REP. 334, 335 (1972).

[24]. While this was brought as a right of privacy claim, it is more akin to the modern conception of the right of publicity. Compare RESTATEMENT (SECOND) OF TORTS § 652C (1977) (“ONE WHO APPROPRIATES TO HIS OWN USE OR BENEFIT THE NAME OR LIKENESS OF ANOTHER IS SUBJECT TO LIABILITY TO THE OTHER FOR THE INVASION OF PRIVACY.”) WITH RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (RIGHT OF PUBLICITY) (“ONE WHO APPROPRIATES THE COMMERCIAL VALUE OF A PERSON'S IDENTITY BY USING WITHOUT CONSENT THE PERSON'S NAME, LIKENESS, OR OTHER INDICIA OF IDENTITY FOR PURPOSES OF TRADE IS SUBJECT TO LIABILITY ....”).

[25]. Patricia Lopez Baden, *Ventura Takes Image to Heart*, Star Tribune (Minneapolis, Minn.), Feb. 12, 1999, at A1.

[26]. See Erin Skold, Note, *Title Match: Jesse Venture and the Right of Publicity vs. The Public and the First Amendment*, 1 MINN. INTELL. PROP. REV. 4, 102 (2000).

[27]. *Oak Prods. v. Ohio Disc. Merch., Inc.*, No. SC081563 (Los Angeles Super. Ct. 2004).

[28]. See, e.g., Editorial, *Schwarzenegger vs. Free Speech*, HARTFORD COURANT, MAY 25, 2004, AT A10.

[29]. Lynda Gledhill, *Governor's Bobblehead Says Farewell to Arms*, S.F. Chronicle, Aug. 3, 2004, at A2, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/08/03/MNG0H81NHH1.DTL>.

[30]. See *supra* Part II.

[31]. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).

[32]. See *N.Y. Magazine v. Metro. Transit Auth.*, 987 F. Supp. 254, 261-62 (S.D.N.Y. 1997) (discussing the various First Amendment protections available for political versus commercial speech regarding politicians in the right of publicity context), *aff'd in part, vacated in part*, 136 F.3d 123 (2d Cir. 1998).

[33]. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).

[34]. Cecilia Chung, Comment, *Preservation of First Amendment Rights: Finding the Proper Balance between Expression and Exploitation in Works of Art*, 46 SANTA CLARA L. REV. 889, 899 (2006).

[35]. *N.Y. Magazine*, 987 F. Supp. at 266 (quoting *Wilson v. Brown*, 73 N.Y.S.2d 587, 589 (N.Y. Sup. Ct. 1947)).

[36]. *Lugosi v. Universal Pictures*, 603 P.2d 425, 449 (Cal. 1979).

[37]. *StupId.com*, Home of Stupid Gag Gifts, <http://www.stupId.com/fun/OBCN.html> (last visited Feb. 15, 2009).

[38]. Michael Saul, *Finger Lickin' Furor: 'Obama Fingers,' Barack-branded Fried Chick Fingers, Spark Anger*, Daily News, Apr. 16, 2009, available at [http://www.nydailynews.com/news/politics/2009/03/16/2009-03-16\\_finger\\_lickin\\_furor\\_obama\\_fingers\\_barack.html](http://www.nydailynews.com/news/politics/2009/03/16/2009-03-16_finger_lickin_furor_obama_fingers_barack.html).

[39]. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (Cal. 2001).

[40]. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996).

[41]. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

[42]. *See Lugosi*, 603 P.2d at 449.

[43]. *See Smith & Sobel, supra* note 22, at 346.

[44]. John Locke, *Second Treatise of Government* §27 (1690) available at <http://presspubs.uchicago.edu/founders/documents/v1ch16s3.html>.

[45]. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978)

[46]. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 460 (Ohio 1976)).

[47]. *See White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1517 (9th Cir. 1993) (*White II*) (Kozinski, J., dissenting).

[48]. Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1186 (2008).

[49]. *See Charles J. Harder & Henry L. Self, III, Schwarzenegger vs. Bobbleheads: The Case for Schwarzenegger*, 45 SANTA CLARA L. REV. 557, 557 (2005).

[50]. *Zacchini*, 433 U.S. at 576.

[51]. J. Thomas McCarthy, *The Rights of Publicity and Privacy* 2d § 11:41 (2008).

[52]. *Id.*

[53]. *See, e.g., Botts v. The New York Times Co.*, 2003 U.S. Dist. LEXIS 23785 (D.N.J. 2003), *aff'd*, 106 Fed. Appx. 109 (3d Cir. 2004).

[54]. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984) (describing the single publication rule).

[55]. Uniform Single Publication Act §1, 14 U.L.A. 377 (1990) (creating one cause of action for libel and slander by a single publication, exhibition, or utterance); *See also* Restatement (Second) of Torts § 577A (1997).

[56]. *See Botts*, 2003 U.S. Dist. LEXIS 23785 at \*10.

[57]. Restatement (Second) of Torts § 577A(4).

[58]. *See, e.g., Groucho Marx Prods. v. Day & Night Co.*, 689 F.2d 317, 319-20 (2d Cir. 1982).



[59]. *See* Factors Etc. v. Pro Arts, Inc., 652 F.2d 278, 280 (2d Cir. 1981).

[60]. *See generally* Cher. v. Forum Int'l, Ltd., 692 F.2d 634 (9th Cir. 1982) (holding the publisher of nationally distributed magazine liable under California law for unauthorized use of celebrity's name and likeness for commercial endorsement).

[61]. *Keeton*, 465 U.S. at 778 n.10 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971)).

[62]. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965).