

Alain J. Lapter, Esq.\*

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, 278-312 (2007)

\*\*\*\*\*

#### IV. Global Right of Publicity Protection

Although much rhetoric continues to permeate legal discourse surrounding the need for a federal right of publicity, the pervasiveness of advertising, now on a global scale, increases the need to consider the availability of such protection in foreign lands. As P. John Kozyris noted, comparative law perspectives are "needed now more than ever because of the expansion of international transactions; the globalization of legal culture; and the movements for unification, federation, and law reform around the world." n246 This is even more important for United States celebrities whose names and likenesses have tremendous value worldwide. n247 "Many advertisements are internationally distributed. The internet is the ultimate borderless medium, incorporating both content and advertising." n248 Consequently, an understanding of foreign publicity rights is all the more imperative to avoid substantial destruction to a celebrity's value. To that end, in the first true sign of the need for global harmonization, the Loyola of Los Angeles Entertainment Law Journal hosted a symposium dedicated to international right of publicity schemes.

Please note that the decision regarding which countries to include within the following survey was based wholly on the availability of relevant matter rather than a subjective decision based on personal preferences. The reader should in no way interpret the exclusion of any Asian country from this section as a lack of interest, but simply as the unfortunate result of an inability to obtain information.

##### A. United Kingdom

Unlike the United States, the United Kingdom does not recognize a per se right of publicity or any synonymous right to protect against commercial misappropriation of one's name or likeness. For celebrities, the only courses of redress, though limited, reside in either intellectual property law - in particular, copyright or trademark - or the tort of "passing off." However, the English courts have narrowly construed publicity protection under these devices.

[\*279]

##### 1. Copyright Law

The Copyright, Designs and Patents Act of 1988 (CDPA) n249 is, theoretically, one avenue for protection against commercial misappropriation. Chapter 48 of the CDPA states that the copyright owner of an original artistic picture may prevent third parties from unauthorized reproduction or exploitation of such work. n250 Therefore, a celebrity acquiring copyright in an image has the right to prevent unauthorized commercial reproduction when a "substantial portion of the plaintiff's work" has been appropriated. n251

However, this protection is only available with the picture itself and not the subject underlying the image. The court in *Re: Elvis Presley Trademarks, Inc.*, stated "there is nothing akin to copyright in a name." n252 Furthermore, an individual cannot obtain copyright in his own appearance because the court reasoned that if such a right existed, a celebrity could even prevent a fan from tattooing the celebrity's image on his person. n253 The court's reluctance to entertain a claim for copyright in a name is in line with historical English case law. Since 1869, courts have refused to "recognize the absolute right of a person to a particular name ... whatever cause of annoyance it may be." n254 These judges were unwilling to differentiate, under copyright protection, between non-commercial (e.g., a tattoo) and commercial use of the name or likeness. n255

Furthermore, the courts have only thinly granted the right of bona fide copyright holders, as under Chapter 48, to prevent the reproduction of an image. In *Bauman v. Fussell*, the court held that a painting incorporating the unauthorized reproduction of a "protected" photograph was not a Chapter 48 infringement because the artist had introduced personal creative vision into the painting and merely used the photograph as a reference. n256 Although some may argue that the defendant clearly used a "substantial portion" of the picture in derogation of the CDPA, courts have defined "substantial portion" as an analysis of quantitative and, more importantly, qualitative measures. n257 Thus, in addition to how much of the [\*280] work was appropriated, the analysis includes whether the defendant appropriated the "feeling and artistic character" of the underlying work. n258

## 2. Trademark Law

Under the Trade Marks Act of 1994, names theoretically receive protection so long as they achieve the requisite level of distinctiveness. n259 Distinctiveness is attained when the name is: (1) invented, (2) not descriptive of the product's characteristics, (3) the applicant's signature, or (4) unique. n260 However, this protection is limited, if not altogether inapplicable, for celebrities. Although celebrities have attempted to protect their names under the Act, the relevant case law implies that "the more famous a personality becomes, and as his or her name or nickname passes into common usage, the less likely it is that he or she will be entitled to claim an exclusive right to the name." n261

To illustrate this contention, the court in *Re: Elvis Presley Trademarks, Inc.* did not permit the plaintiffs to register the name "Elvis Presley" because it was too well known to the public and, therefore, not distinctive. n262 In short, the more famous the celebrity the less likely he will have the right, because of a lack of distinctiveness, to register the name, and thereafter prevent its use in advertisements. n263 The court also surmised that the likelihood of confusion in having multiple manufacturers appropriate the image was both irrelevant and nonexistent. "When people buy a toy of a well known character because it depicts that character, I have no reason to believe that they care one way or another who made, sold, or licensed it." n264 It also appears that the court did not entertain an unjust enrichment argument, a cornerstone of United States Trademark protection, in rejecting the plaintiff's registration petition.

In another likelihood of confusion action, the musical group ABBA sued for the unauthorized use of their images on T-shirts and pillowcases. n265 ABBA's central argument was that the defendant was exploiting their image and that purchasers would incorrectly assume that the group had endorsed or were otherwise associated with these products. n266 The court vehemently disagreed with the [\*281] plaintiff's characterization of the purchasing public's naivete, stating "I do not think anyone reading the advertisements ... could reasonably imagine that all pop stars ... were giv-

ing their approval for the goods offered." n267 Since ABBA was in the music business and the defendant in the business of selling images, confusion either could not occur or the public would not care if the obviously illusory endorsements were authentic.

It is clear that the English courts will not protect a celebrity's name or likeness to the extent U.S. courts would under section 43(a) of the Lanham Act because, in the English courts' view, likelihood of confusion will not ensue. In addition, since the names themselves are not distinctive, unjust enrichment is not a viable argument.

### 3. Common Law Tort of Passing Off

Although ABBA did not present a colorable claim of consumer confusion under the Trade Marks Act, an action under the common law tort of passing off could provide a similarly situated celebrity a proper remedy. The tort of passing off, originating from acts of intentional deception, presumes to protect against consumer confusion and unjust enrichment, two justifications that courts were unwilling to entertain under the trademark cases. According to Hayley Stallard, "where a personality is sufficiently well-known, the non-consensual use of his or her name, image, or voice may give rise to a misrepresentation that the personality endorses, or is connected with, the products or services in question." n268 As Lord Langdale stated, "[a] man is not to sell his own goods under the pretence that they are the goods of another man." n269 This is so because the "property right protected is not that of the mark, the name, or the get-up itself, but the right in the goodwill attached to the business." n270

However, courts have constructed an overwhelmingly narrow window of protection, requiring that the plaintiff be actively engaged in the merchandising business in order to demonstrate a prima facie case. n271 The Lyngstad court reasoned that the group could not preclude the use of their name on t-shirts because [\*282] they had never marketed such goods themselves. Therefore, they could not establish the requisite goodwill. n272

In order to prevail, a plaintiff-celebrity would have to demonstrate that he had a reputation as an endorser, and that a significant portion of the public would mistakenly believe he endorsed the product. Even if the celebrity passes this hurdle, the courts have held that an "unofficial" disclaimer on the product was sufficient to prevent consumer confusion. n273 Further complicating the matter is the fact that courts will only apply these principles to fictional characters and not to real persons who do not own the copyright in their names or likenesses. n274

In *Halliwell v. Panini SpA*, the court was unwilling to grant an injunction to the Spice Girls in connection with a series of unauthorized stickers of the singers that did not include a disclaimer. n275 The court disagreed with the plaintiff that the lack of a disclaimer would confuse the public. It held that the "absence of the word 'unofficial' on the defendant's product would not mislead the public." n276 The court, in harmony with the court in *Elvis*, held that the public placed very little to no significance on whether the endorsement was official and that the effect of an "official" designation on the public's purchasing decisions was minimal at best. n277 Therefore, consumer confusion, a prerequisite to a passing off claim, did not exist.

### 2. Midler in the United Kingdom

As is evident, the prospect of Bette Midler prevailing on a "right of publicity" claim in the United Kingdom is relatively weak. Based on the *Elvis* decision, and the English courts' basic aversion to

recognizing a celebrity's intellectual property ownership in his name or likeness, the likelihood of a cause under either the CDPA or the Trade Marks Act seems far-fetched. First, under CDPA Chapter 48, the court clearly held that no copyright resides in a name. Second, a court would probably find that Milder's name was not distinctive as interpreted by case law, and therefore unprotected regardless of the commercial nature of a third party's use. Consequently, this author contends that, all things being equal, in the sense that Midler's popularity and goodwill are identical in the United Kingdom as they are in the United States, her best hopes for recovery reside in a "passing off" action.

In *Reckitt & Colman Products v. Borden, Inc.*, the House of Lords promulgated a three-part test to demonstrate a prima facie claim for passing off:

[\*283] (1) Plaintiff's reputation: Goodwill must be established in the mind of the public, or a reputation attached to the goods/services that the plaintiff supplies by association with the identification of the packaging/get-up;

(2) Defendant's representation: Establish misrepresentation by defendant to the public by showing that the defendant's actions, whether intentional or not, lead or are likely to lead the public into believing that defendant's goods/services are plaintiff's goods/services; and,

(3) Likelihood of damage: Demonstrate that plaintiff suffers - or is likely to suffer - damage by reason of the erroneous belief caused by defendant's misrepresentation. n278

Based on Midler's career and persona, the singer could demonstrate the requisite goodwill in the minds of the public. As to the test's second prong, the Midler court held that the defendant made an intentional misrepresentation presumably leading to consumer confusion. However, as noted, English precedent takes an extremely narrow view of possible consumer confusion. In *Lyngstad*, Judge Oliver simply did not believe that reasonable people would connect the plaintiff with the defendant's goods or services even in the face of unauthorized use of the plaintiff's name or likeness. n279 More recently, in the *Halliwell* case the court concluded that the public did not care about the product's origin. The public solely desired the product itself. n280 Unlike United States right of publicity case law that does not require proof of consumer confusion, Midler would have to show direct evidence of confusion. One option would be to compile consumer surveys demonstrating confusion over the product's endorsement and origin, such as those used in trademark likelihood of confusion actions under section 43(a) of the Lanham Act. Although case law has created a presumption against a finding of confusion, compelling survey results may overcome the *Lyngstad*-created prejudice.

Even if Midler established consumer confusion, her reluctance to enter the world of endorsements will probably create a complete bar to recovery. In order to prevail in a passing off action, Midler would have to prove that a common field of activity existed between Ford's use of her voice in advertisements and her personal initiatives in merchandising. n281 In *Lyngstad*, Judge Oliver refused to entertain the group's damages claim because they had never carried on any business in the United Kingdom beyond the production of music. Since ABBA had never entered the field of merchandising, not only would that preclude a finding of consumer confusion, but ABBA could not prove damages through the unauthorized use of [\*284] their name. n282 As a result, if Midler had previously endorsed products, and in particular automobiles, she would probably have a better chance to prevail. However, her aversion to advertising may be her ultimate downfall. It is also interesting to note that English case law does not resolve, with regards to "common field of activity,"

whether Midler would simply have had to previously endorse any product or whether she had to have actually endorsed an automobile in order to prevail over Ford's use of her voice.

The sheer lack of protection leaves celebrities with very few remedial options. Consequently, Julie King urges celebrities to follow certain guidelines to best protect their identities. She suggests:

Incorporate as a company as soon as possible with a registered trademark for the company logo and name ... and signature of the individual, whether or not it is potentially problematic. Registration should be secured in classes that include common merchandising products such as textiles and stationary ... . Approach merchandising from an educational position ... to inform the public of official merchandise ... . Take a number of photos in which the individual can own the copyright, and make them available as part of press kits that go along with the concept merchandising ... . Start immediately to trade in a wide variety of merchandise. n283

Although good advice for celebrities who rely almost solely on their name and picture, it would not protect Midler or other similarly situated performers whose intrinsic value is derived from indicia beyond name or likeness. First, the English trademark system does not permit the registration of a person's voice. Even if Midler could register her voice as a trademark, Ford did not use her actual voice but accomplished the misappropriation through an impersonator. n284 Second, the English system forces performers like Midler to merchandise products, potentially undermining their personal values regarding commercialization. Consequently, notwithstanding Ms. King's recommendation, Midler would almost certainly not prevail in a publicity rights action under English law.

## B. France

Translated as *la droit a l'image*, the right of image in France is muddled in ambiguity, particularly in relation to the protection against unauthorized commercial use of one's name or image. n285 The right, derived from the general tort under Article 1382 of the Civil Code, is mired in controversy as to whether it is a property right akin to the United States right of publicity and therefore applicable against commercial misappropriation, or whether the right solely provides a [\*285] personal privacy protection. If it is the latter, it would only protect against the morally-based repercussions - reputation and embarrassment - associated with unauthorized use of a name or likeness. n286

### 1. Droit a L'image

Article 1382 of the Civil Code states quite broadly and ambiguously that: Any person who performs an act that harms another person must compensate the other for the harm caused by that act. n287 Out of this Article, judicial precedent extrapolated a right of image recognized as a bundle of personality rights including the right to prevent the unauthorized fixation and reproduction of one's image. n288 Although a slight shift in the courts has occurred, this personality protection consisted mostly of moral rights: "the right to privacy, the right to protect one's honor and reputation, and the right to control the use of one's image." n289 It is only recently that French courts have entertained a commercial misappropriation claim under this right of image bundle. n290

The moral rights underlying the right of image were first recognized by French courts in the late 19th century in a case commonly referred to as the Rachel Affair. n291 In the Rachel Affair, an artist drew a portrait of the famous actress Rachel on her deathbed, and thereafter proceeded to sell the

work. Understandably, the deceased's family vehemently objected to the sale and initiated a right of privacy - not a right of image - action. n292 The court, siding with the family, held that "no one may, without the explicit consent of the family, reproduce and bring to the public eye the image of an individual on her deathbed whatever the celebrity of the person involved." n293 The court's decision falls under the moral right justifications of respect for a family's suffering.

Since the Rachel Affair, French courts have broadened the scope of protection and established a right of image independent from actions regarding invasion into someone's private life. For example, in the Papillon decision, the court held that [\*286] the plaintiff had the right to prohibit the unauthorized use of his photograph on the front cover of a book detailing his life. n294 The court held that the book itself was not an invasion of privacy. However, the use of the photograph, without the plaintiff's consent, infringed his right of image. n295

In light of Papillon, French courts have begun to face the dilemma characterized as the conflicting concepts between a right to one's image versus a right on one's image. Right of image experts Elisabeth Logeais and Jean-Baptiste Schroeder explain that understanding the difference between privacy and property arguments for protection of one's image is key:

On the one hand, the right to protect one's image from unwanted exposure embodies a privacy interest. This aspect flows from the general difficulty in placing a specific value on one's personal rights, while also recognizing the general consensus that one cannot alienate a personal attribute - the extra patrimonial nature of the right ... . On the other hand, the right also embodies the desire to protect a marketable asset ... characterized as the right on the image (or the right to profit on the image) - the patrimonial nature. n296

The Paris Court of Appeals, recognizing this problematic distinction, held that a violation of the right of image may cause both economic and moral injury when a celebrity had attained commercial value in his image. n297 Consequently, "the modern perception of the right of image recognizes its dual nature, encompassing both a negative, subjective right to prohibit fixation and reproduction of one's image, as well as a positive, economic right to commercially exploit one's image." n298 It is important to note that "image" in France includes likeness, voice, photograph, portrait, or video reproduction. n299

Right of image case law has explicitly stated that any person, regardless of fame, can prevent the misappropriation of their image. As Logeais and Schroeder discuss, judicial precedent has established four principles regarding the right to one's image. n300 First, the medium used to reproduce the person's image is [\*287] irrelevant. n301 Second, a celebrity's stage name is also protected, even if fictitious, because the name is representative of his personality. n302 Third, the person must remain recognizable in the reproduction. n303 The less famous the person in the image, the more conspicuous his image must be in the reproduction. Finally, courts have strongly affirmed the concept that "consent must be clearly expressed for both the taking and the further usage of a person's image." n304

These principles have broadened the scope of protection courts will entertain to include, though narrowly, claims against commercial misappropriation of a celebrity's property value in their image. In Noah v. Soc. Frse de Revues Team, the court upheld the right of the plaintiff, Yannick Noah, a famous tennis player, to prevent the unauthorized reproduction of his photograph in brochures lack-

ing any informative captions. n305 The court found that the brochure was purely commercial, and therefore dismissed the defendant's newsworthy argument. n306

Interestingly, French courts have also bifurcated their analysis as to the type of injury suffered, both directly on the celebrity and the potential injury caused by consumer confusion. In *Belmondo, Halliday and Vartan v. Eminence*, the defendant's posters portrayed impersonators of the plaintiff-singers. n307 The court awarded damages because consumers were shown to have believed that the singers had endorsed the product. However, since the singers had never marketed their image, the court held that awarding damages for direct economic injury to the plaintiffs' value was inappropriate because the plaintiffs could not demonstrate a loss of profits. n308 In relation to *Midler*, the court's willingness to recognize the ensuing consumer confusion due to the use of an imitator as the basis for recovery is vital to a successful claim.

#### 4. *Midler* in France

Based on *Logeais* and *Schroeder*'s extrapolated principles as well as the French court's recent propensity for protecting the right to one's image, *Midler* could prevail in a claim against Ford. Under French law, the two relevant prongs [\*288] regarding *Midler* pertain to: 1) whether *Midler* was recognizable in the reproduction of her "image," and 2) the lack of consent.

As in *Belmondo*, French courts will entertain claims of misappropriation where the advertisers employed the services of imitators to copy a celebrity's highly distinguished traits. As early as 1975, a French court held that "the imitation of the actor's voice infringed his personality rights and such wrongdoing entailed moral and professional damage." n309 Consequently, if *Midler* can properly demonstrate that consumers mistakenly believed the voice in the commercial was hers, as she did in the United States, the use of an imitator will not prevent a finding of infringement.

The consent requirement is a key element in determining the breadth of permission to use one's image. The use of a person's image requires prior, express, and specific consent given for a specific use and duration. Furthermore, the toleration of past uses does not constitute a general waiver of persistent future appropriation. n310 For *Midler*, the fact that she explicitly forbade Ford to use her voice in their advertisements will work greatly to her advantage.

Although *Midler* is likely to prevail in a case against Ford, the court will probably diminish the extent of damages because of her persistent refusal to market herself beyond her professional career. She could receive damages as a result of the consumer confusion, but a court will not award her economic damages in line with *Belmondo* because she had never marketed herself in the past. Therefore, a court might decide that she could not prove lost profits to her merchandising enterprise. However, such a holding would ignore the potential of future lost profits both in merchandising as well as in her acting career. For example, if the advertisement was dishonorable to *Midler*'s reputation, the market value of her image could plummet.

As discussed, *Midler* was forced to internalize the externalities of Ford's actions. In order to avoid such a consequence, a court may be better off disregarding past merchandising, or lack thereof, as the sole indicator of lost profits and entertain evidence of future economic loss. This would produce two positive and equitable results. First, it would economically redress the injury to the plaintiff's intrinsic value. Second, it would further deter advertisers from engaging in deceptive merchandising because it would close the remedial loop-hole requiring a demonstration of direct and contemporary lost profits.

[\*289]

## C. Italy

Like many countries, Italy's legal framework does not expressly provide right of publicity protection. However, an individual is not without protection as courts have recently concluded that several sections of the Italian Civil Code, modeled after the French Civil Code, protect the "right to image" as that of a personality right. n311 Particularly, an individual can seek redress through several statutory enactments centered on an individual's privacy, protection of one's image or name, and copyright law. However, as this section will discuss, the greatest degree of protection may lie outside the bounds of legislative language, and with the court's judicially created right, which in some respects mirrors the amorphous language in White. n312

### 1. Statutory Law

The Italian Civil Code incorporates several articles under which a private individual can seek protection from the unauthorized use of his name or image. In particular, Articles 6 and 7 protect the right to one's name, while Article 10 is directed at a person's image.

While Article 6 expressly states the overall premise that "every person has a right to the name given [him or her] according to law," Article 7 articulates the potential for judicial intervention. n313 The article states: A person whose right to the use of his name is contested or who may be prejudiced by the use made of it by others, can judicially request that the injurious practice be terminated without prejudice to the right to recover damages. n314 Meanwhile, Article 10 provides the ability to prohibit the use of one's image without prior consent. It states:

Whenever the likeness of a person ... has been exhibited or published in cases other than those in which such exhibition or publication is permitted by law, or in a manner prejudicial to the dignity or reputation of such person or relative, the court ... can order the termination of such abuse without prejudice to the right to damages. n315

Interestingly, the ending language of both Articles 7 and 10 explicitly notes that the issuance of injunctive relief in terminating the unauthorized use of one's name or image will not affect the potential for recovery of damages of such use. [\*290] Although the language of these articles arguably provides a plausible avenue of redress, in reality the statutes are right of privacy centered and, therefore, may bar recovery to celebrities who solely claim financial injury. n316

Finally, a person can seek right of publicity redress under Article 96 of the 1941 Copyright Law that prohibits the unauthorized display, reproduction, or commercial distribution of a person's portrait. n317 However, akin to the First Amendment argument fervent with right of publicity naysayers in the United States, Italy's Copyright Law includes freedom of speech protective language in that Article 96 does not extend to "justified" uses including "when reproduction is associated with facts, events and ceremonies which are of public interest or have taken place in public." n318 Such use by police or for scientific, didactic, or cultural reasons is also protected against publicity claims. n319

### 2. Common Law

Although the Italian Civil Code, as well as the Copyright Law, provides explicit protection against the unauthorized use of one's name or image, the strongest degree of protection may lie with the judicially created right of publicity. Unlike English case law that further hindered the ability of an individual to obtain a proper remedy, creating arguably insurmountable obstacles to successful litigation, Italian courts have expanded the right of publicity protection concurrently available under the Civil Code. As a result, individuals enjoy broad protection against the unauthorized use of their indicia of identity, which in some ways mirrors the broad language of the Ninth Circuit in *Midler*.<sup>n320</sup>

The seminal case first recognizing the right of publicity beyond the bounds of the Italian Civil Code involved Lucio Dalla, a famous Italian singer. Dalla brought an action against Autovox SpA, and alleged that the company misappropriated his persona in using two of his most distinctive elements, a woolen cap and a pair of small round glasses, in an advertising poster.<sup>n321</sup> Eerily similar to *White and Midler*, Dalla argued that the defendant misappropriated his persona in that consumers would immediately associate the cap and glasses with him, and consequently would [\*291] mistakenly believe that he endorsed the products depicted in the poster.<sup>n322</sup> Like Tom Waits, Dalla had always refused to endorse products.<sup>n323</sup>

As Silvio Martuccelli notes, the court's power, if not expectation, to "reason by analogy" between the Civil Code and a controversy to which no applicable law existed laid the foundation for Dalla's successful action.<sup>n324</sup> Applying the principles of Article 10, "the judge in the Dalla case reasoned that such protection should also apply to unauthorized uses of attribution of one's persona."<sup>n325</sup> The court concluded that "Dalla's right of image had been infringed not by the publication of his picture or portrait, but by the reproduction of some distinctive elements of his personality ... ." <sup>n326</sup> Ever mindful of "freedom of speech" counter-arguments, the judge recognized that the use of Dalla's indicia of identity was purely for commercial purposes and not for purposes of public interest in information.<sup>n327</sup>

Following Dalla, courts not only embraced the holding but have arguably broadened it by awarding protection for "the mere fame or popularity of the celebrity."<sup>n328</sup> Two years after Dalla, the Italian court in *Bablioni v. Eretel Srl & Disco Spring* held that the unauthorized use of the plaintiff's image and signature in a calendar constituted a right of publicity infringement.<sup>n329</sup> Thereafter, the court held that the use of a look-alike of a famous actress - Monica Vitti - in a magazine advertisement misappropriated her persona, in large part, because of the use's commercial nature.<sup>n330</sup> Akin to the Ninth Circuit's reasoning in *Midler*, the use of an imitator will not prevent a right of publicity action, so long as the sufficient indicia of identity of the celebrity are evoked.<sup>n331</sup>

As Martuccelli synthesizes, Italian courts have justified this broad right of publicity on three grounds: 1) protecting "an individual's interest in personal dignity and autonomy;" 2) preventing unjust enrichment by protecting the celebrity's commercial value; and 3) indirectly protecting consumers against "false [\*292] suggestions of endorsement."<sup>n332</sup> Although these justifications mirror those typically put forth in the United States, the Italian system differs in that it requires one additional major element - celebrity status.<sup>n333</sup>

### 3. *Midler* in Italy

Unlike the United Kingdom and France where *Midler* may have significant problems bringing a successful "right of publicity" action, her chances in Italy are extremely strong. First, instead of a

purely privacy-based scheme that may preclude recovery, Italy has fully recognized a celebrity's right to the commercial value of his image. n334 Second, as the court clearly laid out in Vitti, the use of an impersonator is no defense to liability. n335 Third, Midler's unwillingness to inject herself into the world of endorsements is not a bar to recovery and, in actuality, may work to her advantage in arguing that the replication of her voice damaged her reputation. Finally, and certainly most important to a successful action, Martuccelli notes that "Italian civil law recognizes that foreigners have the right to initiate any legal proceeding available to Italian citizens to protect the enjoyment and the exploitation of one's rights." n336

#### D. Argentina

In Argentina, like the laws of the United Kingdom, no express positive law creates a right of publicity. Protection for the concept of *derechos personalísimos*, or highly personal rights, is derived, if at all, from legal principles existing under different bodies of Argentine law. With an absence of a direct personality rights statute, plaintiffs must turn to other bodies of law, including: international law, intellectual property law, and the right to intimacy and privacy. n337

##### 1. International Law

In accordance with the Argentine Constitution, international agreements are given constitutional status making them, in effect, directly applicable as law. Particularly, the Universal Human Rights Declaration (UHRD) provides that every human is entitled to recognition of one's legal personality. n338 Furthermore, the [\*293] American Declaration on Rights and Duties of Man (ADRD) provides protection against attacks on a person's reputation and private life. n339 Lastly, Article 19 of the Constitution specifically protects a person's right to privacy. n340

Two main problems exist when relying on these international laws for a right of publicity claim alleging the unauthorized commercial use of a celebrity's name or likeness. First, international laws do not create any specific and redressable claims but simply put forth general notions and directives. It is up to the signatory state to promulgate legal doctrine in accordance with the agreements themselves. Therefore, a celebrity will still need to investigate laws in other sections of the Argentine Legal Code.

Second, the agreements do not appear to address misappropriation of one's likeness under the rubric of a property right, but only as relating to the right of privacy. n341 As a result, the agreements, in themselves, may not provide sufficient protection, if any, for celebrities whose claims are based on a theory of commercial misappropriation and lack of adequate compensation for the use of the image rather than the reputation-based arguments common with privacy rights.

##### 2. Intellectual Property Law

In discussing the right of publicity in Argentina, one must consider possible protection under both copyright and trademark law. Unlike the United States, Argentine copyright laws specifically provide protection for publicity rights. n342 Meanwhile, trademark protection could safeguard certain, but not all, aspects of a celebrity's persona. n343

Article 31 of the Copyright Law provides that a person's photograph may not be used in commerce absent the express consent of that person. n344 Synonymous with French laws, consent for a specific use may not be extended to other uses regardless of past toleration. n345 Furthermore, the

statutes' protection applies to the [\*294] use of a person's image and voice in a variety of mediums. n346 Although the limits of protection are ambiguous, many argue that only commercial misappropriations are redressable. n347 Several non-commercial uses - educational, newsworthy, scientific, and cultural - are explicitly exempt. n348

In order to bring a right of publicity claim under the Copyright Law, a claimant has to demonstrate, akin to the United States, an:

unauthorized use of a person's image or other elements of a person's identity by means of reproducing the image or elements ... . The plaintiff is not required to show malice, the loss of business or clients, defamation, harassment, or the invasion of privacy. Tortious conduct results from the mere reproduction of a person's identity ... . n349

As mentioned, specific non-commercial uses are the only exceptions.

Argentine trademark law also offers right of publicity protection, though solely to a limited set of features. Specifically, Article 3(h) of the Trademark Law protects against the unauthorized use of a person's name or portrait as a trademark. n350 According to Guillermo Cabanellas, Argentine trademark law protects a person's publicity right in two aspects. First, if a person registers or uses an aspect of their identity as a trademark, he is granted an exclusive property right to that trademark. This protection extends to "aspects such as a person's name, photograph, picture, or likeness." n351 Second, "the elements of a person's identity may not be used or registered as a trademark without such person's authorization ... ." n352 If a third party wants to use or register as a trademark aspects of a person's identity - names, pseudonyms, and portraits - under Article 3(h), that party will need express consent. n353

Therefore, one can argue that Argentine trademark law provides both a sword and shield against commercial misappropriation. As to the former, the law grants an exclusive property right that can be employed to prevent unauthorized use. The law also provides a shield in requiring consent prior to the use or registration of a person's identifying features.

[\*295]

### 3. Right to Intimacy and Privacy

Pursuant to Article 1071-bis of the Civil Code, certain unauthorized uses of a person's name, likeness, voice, or photograph may constitute a tort for the violation of the right of intimacy. n354 Article 1071-bis provides that "any person who arbitrarily intrudes into another person's life, publishes portraits, ... mortifies another person with regard to one's habits or feelings, or otherwise damages his or her intimacy" shall be liable for damages. n355 Although purportedly a right of publicity statute, Article 1071-bis' language as well as relevant case law strikes a strong similarity to a right of privacy doctrine because of its focus against moral and emotional injury instead of commercial harm.

In *Ponzetti de Balbin v. Editorial Atlandia*, a newspaper published the picture of a prominent politician on his deathbed. n356 In an Article 1071-bis action brought by the deceased's family, the court found the paper's actions reprehensible as an infringement of the family's privacy expectations. n357 Other cases have held as infringing both the creation of a false or harmful impression on

a person's acquaintances, n358 and the placing of a person's image in a ridiculous setting. n359 Furthermore, relevant precedent has redressed any damage to a person's reputation, prestige, or feelings.

#### 4. Midler in Argentina

Midler could approach a suit under Argentine Law vis-a-vis any of the approaches described above. However, the privacy mantra under which the Argentine Constitution, coupled with the UHRD and ADRD, as well as Article 1071-bis apply will make her case very difficult to properly demonstrate if based wholly on a theory of loss to commercial value.

Midler's best chance of recovery for a direct right of publicity action is pursuant to Argentina's unusually broad copyright laws. Article 31 prohibits the use of a person's name, image, or likeness for commercial purposes without his express consent. n360 Furthermore, experts have posited that image would include the [\*296] use of a person's voice without authority. n361 Of course, Midler's main hurdle relates to the fact that Ford did not actually use her voice in the advertisement. Research for this article did not reveal any precedent dealing directly with the issue of voice imitation as violating Article 31.

Midler could pursue an Article 1071-bis action if she manages to surpass several hurdles. First and foremost, she would need to demonstrate that Ford's misappropriation caused harm, not to her commercial value, but to her reputation and honor as a person who, for artistic or personal reasons, refrained from engaging in merchandising. Her persistent refusal to endorse products, notwithstanding her undeniable goodwill, would help her cause. Second, Midler would need to prove that an imitated voice is an attribute incorporated within Article 1071-bis. She could present evidence of consumer confusion to argue that using an imitator is irrelevant because consumers believed it was her, due in large part to her celebrity status and highly recognizable voice, and, therefore, she suffered an injury identical to one suffered via the use of her actual voice.

Under either theory, she could argue that public policy favors protection against unauthorized voice imitation. If such protection is not granted, courts would have created an incredible loophole for advertisers arguably leading to severe economic and emotional harms. Aside from voice misappropriation, such precedent would permit advertisers, with impunity, the right to use third parties to imitate any of the personal attributes of a celebrity without consent or remuneration.

#### E. Brazil

Like its South American neighbor, Brazil protects right of publicity-like interests under several bodies of law. n362 Though not labeled as right of publicity statutes, the Brazilian Constitution and neighboring rights, as well as consumer laws can provide some forms of protection under the umbrella of personal rights which provide exclusive rights to image and privacy.

##### 1. Brazilian Constitution

Article 5, section X of the 1988 Brazilian Constitution regulates the right to privacy as well as the right to a person's image. Section X states that "privacy, private life, honor, and the image of all people are inviolable." It also "assures the right to compensation for material and moral harms resulting from violating one's rights." n363

[\*297] The section's broad language - material and moral harms - protects against any unauthorized use. In addition, no formalities are required before a plaintiff can invoke section X. n364 Unlike the privacy-esque laws prevalent in other states protecting only against emotional and reputational injury, Brazil's Constitution clearly protects injuries related directly to the economic loss associated with the unauthorized use of a celebrity's image. The "sole prima facie element for violation of the right is lack of consent." n365

According to Deborah Fisch Nigri and Silvia Regina Dain Gandelman, Samuel Warren and Louis Brandeis' right of privacy article had a profound impact on the development of Brazil's privacy and image rights laws. n366 In addition, Brazilian law-makers and courts remain concerned that without effective laws, modern technology would further afford advertisers tools to invade a person's privacy. n367 As a result, one can argue, based on the proceeding precedent, that Brazilian courts have afforded right of publicity plaintiffs broad protection.

In *Maite Proenca Gallo v. Editora Azul*, n368 the magazine-defendant published photographs of a famous actress during a play in which she appeared nude. The audience was asked to refrain from taking pictures. In a suit alleging material and moral injury for the unauthorized use of the picture, the court found for the plaintiff, notwithstanding the fact that the picture was reproduced in a newspaper. n369

In addition to the Gallo decision, protecting unauthorized exploitation of image through a photograph, section X protection is not limited to an exclusive number of mediums but is malleable with advances in technology. n370 Furthermore, the Constitution explicitly protects against the unauthorized use of images and voices of athletes and sports celebrities. Article 5, section XXVIII(a) states "it is assured under the law protection to individual performances of collective works and the reproduction of image and human voices ... ." n371 Although the Constitution does not explicitly provide a remedy for the commercial misappropriation of a celebrity's image through the use of an imitator, it is easy to assume that a court could extend these constitutional provisions to entertain such a claim.

[\*298] Brazil has also recognized the doctrine of neighboring rights as a bona fide avenue, used in conjunction with constitutional provisions and copyright laws, to protect a person's right of publicity. Neighboring rights protect "modes of expression" not explicitly covered in the copyright laws. n372 Akin to United States copyright laws, Brazilian authors and photographers have the exclusive right to prevent the unauthorized reproduction of their work. n373 Therefore, the government's recognition and endorsement of such rights further support the idea that a celebrity could garner protection against the unauthorized commercial use of his voice, even by way of imitation. As Nigri and Gandelman note "despite the pervasiveness of voices and images in our daily life ... , protection of the personal attributes of the persons engaged in these activities has been historically considered less worthy of traditional copyright protection than that afforded to authors of books and creators of works of art." n374 It appears that the indoctrination of neighboring rights, as ancillary to other legal protection measures, demonstrates the government's willingness to extend personality rights beyond the copyright and constitutional frameworks.

## 2. Consumer Laws and Advertising Regulations

Another avenue of protection for right of publicity plaintiffs exists under Brazilian consumer laws, as well as regulations directed toward the advertising industry. Known as the Brazil Self Regulatory Publicity Code, the *Codigo Brasileiro de Auto-Regulamentac o Publicitaria* (CBAP) n375 is admin-

istered under the auspices of the Conselho Nacional de Auto-Regulamentação Publicitária (CONAR). n376 In one of the more progressive regulatory schemes, these regulations "secure a certain level of protection between the advertising agency and its client, and between the agency and the consumer." n377

Article 37 of the consumer laws forbids any kind of misleading or abusive advertisement and states, in relevant part:

Section 1: Any kind of public advertisement, totally or partially false, or by any means, even by omission, capable of inducing the consumer in error with regard to the nature, characteristics, quality, source, price, or any other information regarding products and services, is considered misleading;

...

[\*299] Section 3: For the purpose of this Code publicity is misleading by omission whenever it fails to present essential information regarding the product or service. n378

Violation of these statutes could lead to the levying of penal and monetary fines on anyone, agency and advertiser, who disseminates misleading or abusive publicity which could potentially lead to consumer confusion. n379

As noted, claimants can also invoke the CBAP for protection against misleading advertisement. CONAR will entertain allegations centered on protecting an individual's image from being used in an unauthorized method. n380 They can impose a wide variety of penalties including warnings; recommendations to amend, alter, or correct the advertisement; and even injunctions against further dissemination of the advertisement. However, unlike a suit under Brazil's Consumer Laws, the CBAP applies only to the advertising agency and not the advertiser itself. n381

### 3. Midler in Brazil

Nigri and Gandelman note that Brazil's definitions of one's image include voice, name, likeness, or "other unique characteristics that distinguish the person from others." n382 This broad definition appears synonymous with the Midler court's broad interpretation of publicity rights under common law. n383 Furthermore, Brazilian law does not require a demonstration of economic gain by the defendant in putting forth a colorable claim. As one court held, "any person whose image and/or name were unlawfully used for publicity reasons has suffered an invasion of privacy and a patrimonial reduction in view of someone else's profit. This unlawful use per se allows compensation." n384

According to right of publicity experts, the right of image "embraces videophonogram images, television, radio, gestures, and dynamic expressions of one's personality." n385 Therefore, the unauthorized use of one's voice or virtually any body part that consumers can identify with a certain individual will lead to a redressable claim. In the Peixoto case, the sister of a deceased artist objected to a film portraying the artist as an uneducated prostitute and blackmailer. Although the [\*300] film did not mention the artist by name, viewers could easily associate the character with the artist. n386 The court found for the sister and awarded her compensation for material and moral harm, and granted an injunction against the movie's distribution. n387

In line with these precedents and statutory schemes, it is likely that Midler will succeed under Brazilian law. As discussed, the Brazilian Constitution broadly protects a person's exclusive right to his image and voice. Like the Ninth Circuit, courts in Brazil have recognized the importance of placing strict limitations on methods advertisers have to market their client's products and therefore have vigilantly protected against the fraudulent misappropriation of a celebrity or athlete's intrinsic value associated with his name and likeness. Although this author could not find a case directly on point with Midler, it is fair to assume that a court in Brazil would entertain an Article 5, section X and section XXVIII(a) suit claiming voice misappropriation through the use of an imitator. In line with Peixoto, a defendant does not have to explicitly use the claimant's "image" in order to violate the constitutional standards. Therefore, as long as it is recognizable, simply imitating Midler's voice is no defense.

Midler could also bring a colorable claim under the consumer laws, as well as the advertising regulations. The consumer laws prohibit any advertisements meant to intentionally mislead the public. n388 The court explicitly found that Ford, after Midler rejected their offer, hired one of Midler's back-up singers to replicate the crooner's voice. n389 Consequently, the court held that the defendant intentionally desired to mislead the public. n390 Midler would also have to demonstrate that Ford's advertisement led to actual consumer confusion regarding her purported endorsement. She could verify such confusion through surveys, as well as other statistical methods. However, the one drawback in a suit under the consumer laws is that the penalties do not result in a direct remedy for the claimant. They only provide for criminal sanctions and/or a fine. n391

For reasons identical to those stated above, Midler could also seek redress via the CBAP in a suit under the advertising regulations. The one clear benefit to a successful claim under these regulations is that the Council can order the [\*301] advertising agency to correct the advertisement or to enjoin its dissemination. n392 The Council also has the authority to "broadcast its position on any violations committed for the failure to comply with the imposed measures." n393 For Midler, who does not market her image, corrective measures may be a more suitable vindication for her image.

## F. Canada

Like the United States, our neighbors to the north have developed a bifurcated approach to protecting against the unauthorized use of a person's name or likeness, in that an individual can find redress both under privacy law and a right known as "character merchandising." n394 However, aside from the cosmetic similarities, the development of publicity rights in Canada differed significantly from the United States on the theoretical level. Consequently, the lack of protection for celebrities appears similar to that found in the United Kingdom.

### 1. Historical Context

Unlike the privacy-centric origins of publicity rights in the United States, Canada's protection schemes arose from the desire to "provide relief against unauthorized character merchandising through the business tort of 'passing off.'" n395 Early in the development of this legal doctrine, Canadian legal scholars and courts realized the intrinsic economical value placed on a celebrity's name or image by the purchasing public. As Robert Howell explains, "The benefit of character merchandising is the persuasive influence on consumers that linking a celebrity with a consumer product or service may engender." n396 However, the market value created by such use is, in reality, a commodity which Howell rightly notes "belongs to the celebrity." n397 As a result, Canada views

the tort of passing off as a vehicle to prevent the false representation of endorsement for a particular good or service. In addition, the tort is wholly proprietary in nature and focused on protecting the plaintiff's goodwill. n398 Under Canadian jurisprudence, the tort presents two main issues: "(1) the requisite level or content of the association between the plaintiff's and defendant's goods or services; and (2) whether the public could be confused as to the plaintiff's endorsement of the defendant's goods [\*302] or services." n399 As Howell points out, Canadian passing off precedent, prior to the 1980s, highly resembled the United Kingdom's historical and contemporary unwillingness to entertain celebrity claims because of their skepticism over consumer confusion due to false endorsements. n400 Like the U.K., celebrities were required to "prove a 'common field of activity' between the defendant's product and the celebrity's persona." n401 In short, fame and inherent value in one's name or image was insufficient to bring a prima facie claim. However, in the early to mid-1970s courts began to recognize this inequitable, if not nonexistent, relief. n402 Consequently, the courts created a quasi-hybrid passing off tort, or the appropriation of personality tort that focused on the misappropriation of a celebrity's image and name rather than the highly convoluted "association" element.

## 2. Appropriation of Personality Tort

In *Krouse v. Chrysler*, n403 the plaintiff, a football player, sued for the unauthorized use of his image in an advertisement. Since Krouse was not in the business of selling automobiles the court held that the tort of passing off was inapplicable. However, instead of wholly dismissing Krouse's claim, the court stated, regarding the commercial misappropriation of his image, that Canadian law did indeed support a remedy for the "appropriation of commercial purposes of another's likeness, voice, or personality." n404 The court ultimately refused to award damages because the league in which Krouse played authorized the photograph. n405

Although personally unsuccessful, the court in *Krouse* explicitly recognized the right and need to provide protection against the unauthorized use of one's name and likeness. Four years after *Krouse*, the Ontario High Court had the opportunity to apply the appropriation of personality test. In *Athans v. Canadian Adventure Camps*, the plaintiff-water-skier sued for misappropriation after the defendant used his image in advertisements. n406 The defendant did not actually use a photograph of [\*303] Athans, but produced an identical line drawing from an acquired photograph. n407 The court found that consumers would easily recognize the plaintiff from the drawing. n408 As a result, the court held that the defendant infringed Athans's exclusive right to market his personality. The key distinction for the court, between Athans and Krouse, was the recognizability of the photograph's subject in that the latter had his back toward the camera while the former's image was clearly depicted. n409 Further court decisions have reiterated the "recognizable" requirement under Canadian jurisprudence. In *Joseph v. Daniels*, the plaintiff claimed a violation of wrongful appropriation after the defendant exceeded the scope of consent regarding the underlying photograph of the plaintiff's torso and proceeded to use the photograph on posters and greeting cards. n410 The court held against misappropriation because the plaintiff - his actual facial image - was not recognizable in the photographs. n411

## 3. Midler in Canada

Midler's chances for success in Canada, like several of the other countries discussed above, depend entirely on the court's interpretation of "recognizability." The plaintiff will have to argue that her case lies along the same line of reasoning as Athans, instead of Krouse, regardless of the fact that

the defendant used an impersonator. Robert Howell identifies five elements to establishing a prima facie appropriation of personality claim, most of which mirror elements underlying a right of publicity action: "1) plaintiff must be identified in the depiction or other indicia; 2) the defendant's use of the plaintiff's persona should be more than incidental or de minimis; 3) there is no express requirement of an intent to misappropriation ... ; 4) there must be damage; and 5) there can not be a public interest in the publication ... ." n412

Without a doubt, Midler can establish the second, third, and fourth elements. However, the first and fifth could present challenges. As mentioned above, the court would need to take a leap in finding that the use of an imitator is no defense as to identifiability if the plaintiff can demonstrate that consumers could not differentiate between the impersonator and the true performer. If the imitation is accurate, it is natural that consumers would not question whether the voice on the commercial is actually Midler. Therefore, the use of a sound-alike would create the same negative impact on the commercial value of her image and voice. She would [\*304] have to internalize the consequences of externalities. In addition, consumers would be duped into thinking that Midler actually endorsed such product regardless of its potentially vile nature.

The consumer protection rationale is also critical when contending that public interest is not served in permitting advertisers from flagrantly misappropriating a person's name, image, or likeness to the detriment of that party. A subject's refusal to use his indicia of identity should act as an absolute bar to the appropriation of his image. Advertisers can not have the unilateral power to simply disregard that person's rejection. This is particularly true when the use of such name or image is wholly commercial in nature. Not only would it invade a private person's right to privacy and a celebrity's right to appropriate remuneration of his valuable image and name, but the advertiser is actually financially benefiting from such misappropriation - not only from the potential increase in sales of the product, but also since hiring look-alikes and sound-alikes presumably costs far less than hiring the real thing.

The major obstacle for Midler lies in the fact that Canadian courts, to this point, have yet to consider the issue of whether the use of imitators violates the misappropriation of personality tort because the voice is still recognizable. The court may very likely find Midler's claim in parallel with Krouse in that the advertisement did not explicitly depict Midler, but simply her voice. Of course if that is the case, the question remains as to how Midler's persona/voice must be depicted in a commercial, which simply has a song in the background, to successfully meet the "recognizability" factor. In the end, this author simply posits that advertisers should not be given such a thinly veiled defense for the intentional and fraudulent misappropriation of another's name or likeness.

#### G. Foreign Protection Conclusion

Although only a microcosm of the worldwide right of publicity protection, those state schemes discussed above provide a sample of the variations that currently exist. They clearly demonstrate the divergent views of the types of protection against the unauthorized exploitation of one's image and likeness. The fact that these countries offer such individualized remedial measures is problematic for Midler-like plaintiffs for several reasons.

First, Midler may not have the right to bring a colorable claim in all the jurisdictions where the misappropriation occurs, notwithstanding the fact that her claim rises out of identical misuse of her voice, arguably causing identical injuries in all relevant states. We live in a world that permits the instantaneous dissemination of information on a global scale. Internet advancements and, in particu-

lar, broadband technology provide advertisers the power to send ads, accessible with the click of a mouse, to all corners of the world. Furthermore, the pervasiveness of satellite television gives broadcasters the ability to beam advertisements to all corners of the world. Consequently, injuries associated with the unauthorized commercial use of one's name or image occur not only instantaneously but on a much greater scale than in the past. Therefore, if one [\*305] agrees that right of publicity protection is appropriate, we must concur that laws in all jurisdictions where the tort is committed must accommodate a redressable claim.

Second, many foreign jurisdictions seemingly protect solely privacy-based injuries. This stands in stark contrast to the United States where numerous jurisdictions have evolved from narrow privacy-based protection, addressing only emotional harms, to a broader scheme inclusive of economic-centered publicity rights. The main problem with statutes solely protecting emotional injuries is that U.S. precedent has held that celebrities could not suffer emotional injuries due to the unauthorized use of their image. This exclusion exists because, like other public figures, celebrities have entered the public sphere relegating them to a lesser degree of protection. n413 In relation to foreign privacy-oriented laws, nothing to the contrary exists whereby a celebrity may evoke emotional injuries as the precursor to a right of publicity-esque claim. Consequently, foreign courts would deny Midler's claim for two rather circular reasons. First, she can not bring suit alleging damage to the economic value of her persona because such a claim is not redressable. Second, although Midler certainly suffered emotional and reputational harm due to Ford's misappropriation, she is barred from bringing a privacy-based suit because she is a celebrity, and therefore her image is, in essence, part of the public domain. Her sole avenue of protection would exist if she had previously marketed her image. Even then, case law may require that her previous endorsements were for similar, if not identical, goods or services to that of the alleged misappropriation. n414

Third, states that do not protect against commercial misappropriation provide a safe haven for infringing advertisers. Countries like the United Kingdom grant advertisers arguably a green light to infringe on the intrinsic value of a celebrity's image without fear of judicial repercussions because of the difficulty in bringing a redressable claim. In short, advertisers have no incentive to refrain from intentionally misappropriating the goodwill and value associated with a particular person. The main problem with this lack of protection is that it will force a celebrity to internalize the potentially severe consequences of externalities (i.e., an advertisement depicting a fraudulent endorsement of a morally questionable product). Aside from injury to the celebrity, consumers also suffer under U.K. law because of the inevitable consumer confusion compounded by the court's complete reluctance to entertain the argument that consumers expect authenticity regarding the alleged endorsement of merchandise. On the other hand, Brazil's broad-based protection - consumer law and advertising regulations - clearly demonstrates the legislature's desire to protect consumers against misleading or fraudulent marketing.

[\*306]

## V. Multinational Protection Schemes

Currently, no multilateral agreements specifically address right of publicity protection. In light of the tremendous growth in global merchandising, especially those involving United States celebrities, some have urged for the creation of a relevant international scheme. n415 Although international harmonization has not been officially proposed, this Part will analyze several multilateral

agreements that either contain some level of protection or which may be best suited to include a right of publicity provision.

#### A. European Convention on Human Rights

Article 8 of the European Convention on Human Rights (ECHR) contains language insinuating protection against the unauthorized use of a person's name or image. It provides that:

(1) Everyone has the right to respect for his family life, his home, and his correspondence;

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or the rights and freedoms of others. n416

The European Court on Human Rights in *P.G. & J.H. v. United Kingdom* interpreted Article 8 as protecting a "right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world." n417 In short, the Article asserts that "everyone has the right to have their private and family life, home and mail respected." n418 It is also important to note that Article 8 is complemented by Article 10. Article 10 addresses the [\*307] freedom of expression concerns associated with too broad a right of privacy and requires that the two doctrines be balanced on an ad hoc basis. n419

In the United Kingdom, the ECHR was recently incorporated into the Human Rights Act of 1998 (HRA). n420 One of the direct legislative intentions of the Act was to further common law jurisprudence regarding the right of privacy. n421 Section 6 of the HRA requires that courts in the U.K. give effect to ECHR provisions, including Article 8, to further interpret privacy right limitations. n422 The HRA's incorporation of the ECHR provisions is also important because it gave claimants the right to file suit in a U.K. court for alleged right of privacy infringements, rather than having to file suit in the European Court of Human Rights in Strasbourg, the normal venue for alleged ECHR violations. n423

In a recent case invoking the ECHR as incorporated within the HRA, Michael Douglas and Catherine-Zeta Jones sued Hello! magazine for publishing pictures of their wedding without consent. n424 According to the facts, the plaintiffs had contracted exclusively with OK! magazine for the publication of said pictures. The court held that Hello!'s actions breached Article 8, thus infringing the plaintiffs' right of privacy and confidence. n425 Several experts have equated the key issues in this case with a traditional right of publicity action, although the court's decision did not explicitly use that terminology. n426

While a step towards fully recognizing a right of publicity, most cases brought pursuant to Article 8 deal specifically with right of privacy issues. n427 This lack of jurisprudence coupled with the court's reluctance to entertain a true right of publicity claim under either its intellectual property schemes or the common law tort of "passing off" will continue to leave plaintiffs like Midler without a redressable claim in the U.K. This author did not find any European Court on [\*308] Human Rights case law interpreting Article 8 under a property-based right of publicity claim.

#### B. The Berne Convention

Most right of publicity experts agree that right of publicity protection belongs within the same pantheon as intellectual property law. n428 If we agree that the right of publicity should in fact exist as

a neighboring right to copyright law, the Berne Convention for the Protection of Literary and Artistic Works (Berne) n429 may provide an appropriate forum.

Currently, Berne does not provide publicity right protection. One obvious reason is that Berne was enacted in 1886, well before the unauthorized commercial use of someone's name and likeness became an international issue. However, in the one hundred-plus years since Berne's ratification, the agreement remains silent as to recognizing the right of publicity. Furthermore, the relatively recent multilateral agreements enacted under the auspices of the World Intellectual Property Organization (WIPO), an arm of the United Nations which administers Berne, are also devoid of relevant provisions. n430

In 1996, WIPO adopted the Performances and Phonograms Treaty (WPPT) enunciating levels of protection not found within Berne. In particular, Article 5 protects the moral rights of performers. It states, in pertinent part "Independently of a performer's economic rights ... the performer shall, as regards to this live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer ... and to object to any distortion, mutilation or other modification of his performances." n431 This moral-rights language is arguably steeped in privacy law rationale, protecting against emotional and reputational harm, n432 and, therefore, clearly insufficient for protecting celebrities' publicity rights. Furthermore, it is only intended to protect audio performances.

Realizing this deficiency, several groups have proposed the enactment of a treaty affording audiovisual performers both economic and moral rights. n433 Known [\*309] as the Audiovisual Performances Treaty (APT), the draft Preamble includes among its goals:

Desiring to develop and maintain the protection of rights of performers in their audiovisual performances in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances,

Recognizing the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information ... . n434

Originally drafted in 2000 at a conference in Geneva, Switzerland, the APT has yet to be ratified. The APT's draft language does not directly provide for right of publicity protection and is explicitly limited to protecting audiovisual performers in their fixed and, in a limited manner, unfixed works.

n435 However, the Preamble, coupled with the strong desire to provide rights of celebrities in addition to those already existing under Berne, is a clear indication that the WIPO recognizes the potential damage to an artist's intrinsic value in a "borderless" world devoid of persona-driven protection.

Although the APT would prove a significant step in the direction of creating a baseline universal right of publicity, any treaty under the auspices of the WIPO has a certain drawback. Specifically, it lacks an effective enforcement mechanism. David Nimmer stated that "the Achilles' heel of all the Great Conventions is that they uniformly lack enforcement tools." n436 Other prominent scholars have described Berne's dispute resolution mechanism as "effectively worthless" because it did not permit private party suits. n437

Since the WIPO administers Berne, a private party must petition its State Department to file suit on its behalf in the U.N.'s International Court of Justice (ICJ), located in The Hague. n438 Theoretically a viable option, the ICJ has never heard a copyright case. n439 There are essentially two main reasons for this lack of [\*310] judicial recourse. First, even if a case is brought and adjudicated, the ICJ can only enforce a judgment if the losing member-state acceded to it. n440 The winning party would most likely have to seek enforcement through the U.N. Security Council via a threat of economic or trade sanctions. n441 Considering that a violation of copyright is relatively benign on the international sphere, a sanction is highly unlikely. Second, as Monique Cordray argues, no state would ever sue in The Hague for copyright infringement "because the sued state would interpret the action as an unfriendly act." n442 Member-states have obviously decided that there are "bigger fish to fry" than copyright infringement.

In context, these experts were referring solely to the Berne Convention. However, if states are reluctant to bring copyright claims to the ICJ, notwithstanding the billions of dollars lost yearly due to piracy, we must assume that a right of publicity action will never see the light of day in the ICJ even if a protection scheme is enacted. Furthermore, nothing in the APT's draft would indicate the implementation of a new enforcement mechanism. Although right of publicity advocates would undoubtedly applaud inclusion of a publicity provision in the APT, the lack of an effective centralized dispute resolution mechanism is problematic. Claimants would have to rely on the development of internal enforcement mechanisms within the same foreign countries that have yet to adequately and effectively implement other WIPO treaties. n443

### C. The World Trade Organization and TRIPs

In contrast to the WIPO, the World Trade Organization (WTO) does provide an effective dispute resolution mechanism governing all its treaties, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). n444 Enacted in 1994, TRIPs provides standards concerning the availability, scope, and use of all three main intellectual property rights - copyrights, trademarks, and patents. Furthermore, TRIPs Article 9 incorporates Articles 1 through 21 of Berne, minus Article 6-bis protecting moral rights. n445

[\*311] Although TRIPs does not explicitly protect the right of publicity, some level of protection may exist under  $\beta$  2, relating to trademarks. In particular, Article 15(1) defines protectable subject matter as:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals ... shall be eligible for registration as trademarks. n446

Thereafter, Article 16(1), enumerating conferred rights, states:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. n447

Taken in combination, Articles 15 and 16 will provide some level of protection for celebrities. First, Article 15(1) explicitly provides for the registration of personal names. Second, Article 16's exclusive rights prohibit the unauthorized use of a registered name. Third, if a defendant appropriates an exact use of the mark, the claimant is not required to demonstrate consumer confusion. The ensuing confusion is presumed. The Article's language also implies that if the claimant can demonstrate an appropriate level of consumer confusion, they can prevail even if the defendant did not duplicate the trademark in toto. For example, assume Michael Jordan owns the trademark to his name. If an advertiser uses the "MICHAEL JORDAN" mark without consent, he is in violation of Article 16, regardless of whether consumer confusion exists. Furthermore, even if the advertiser uses the mark "M.J." to sell basketball shoes, he may remain liable if Michael Jordan can prove that the use of those initials to sell basketball apparel is misleading and results in confusion as to his implied sponsorship of the product. Consequently, TRIPs drafters recognized, though narrowly, the need for a certain level of publicity protection because the unabated use of a celebrity's name has the potential to cause severe consumer confusion, which trademark law at its root attempts to prevent.

Though Article 15 and 16 protections are not broad enough to encapsulate right of publicity in toto, they do provide evidence that international intellectual property negotiators recognize the existence of a problem. Protection under TRIPs is also important because of the dispute resolution mechanism lacking under [\*312] Berne. n448 Unlike the WIPO, which has never presided over a copyright infringement claim, the WTO enacted a revolutionary dispute resolution mechanism capable of providing effective and forceful jurisprudence. n449 Consequently, the WTO has presided over hundreds of cases invoking agreements under their auspices including several dozen claims alleging violation of TRIPs. n450

#### D. Multilateral Agreements Conclusion

Currently, no multilateral agreements exist which explicitly protect the right of publicity to any certain degree. Several organizations, including ECHR and WIPO, have either a limited privacy-based protection or have only proposed a treaty that, in theory, would accommodate some publicity rights. Meanwhile, trademark protection under TRIPs will protect one dimension of a celebrity's persona - his name. The WTO's additional benefit is the creation of a truly effective dispute resolution mechanism that for the first time provides international jurisprudence protecting a celebrity's name, registered as a trademark, against unauthorized commercial use.

Perhaps the greatest catalyst for a true international right of publicity regime would require the intervention of the United States. As noted, United States celebrities are marketed on a global scale and misappropriation of their likenesses results in losses of millions of dollars. Akin to the United States' desire to forge a stronger international copyright regime in order to stifle the billions of dollars lost to global IP piracy, right of publicity losses should also serve as an impetus to establish a strong regime. However, it remains difficult to imagine that the United States will promote a harmonized right of publicity scheme in the near future. The obvious obstacle is the fact that the federal government remains unwilling to enact even a harmonized right of publicity within its own borders. The government has systematically rejected the notion, thereby leaving protection to the states. Consequently, protection may only come through the efforts of a foreign nation's proposal.

#### **FOOTNOTES:**

\* Alain J. Lapter, Esq., Trademark Examining Attorney, United States Patent and Trademark Office, Alexandria, VA; B.S., 1998, University of Colorado; J.D., 2004, University of Connecticut School of Law; LL.M. (Intellectual Property), 2006, The George Washington University School of Law. The author would like to thank Professor Robert Brauneis of the George Washington University School of Law for his guidance, insight, and invaluable suggestions and comments throughout this process. The author also wishes to thank his wife Ana, who endured a lifetime's worth of right of publicity conversations, for her patience and encouragement. Lastly, the author wishes to thank his parents and brother for their unwavering support. Disclaimer: The opinions and arguments presented in this paper do not reflect the official position of the United States Patent and Trademark Office, the United States Department of Commerce, or the United States Federal Government.

n246. P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 *Tul. L. Rev.* 165, 178 (1994).

n247. Dougherty, *supra* note 1, at 421.

n248. Dougherty, *supra* note 1, at 421.

n249. Copyright, Designs & Patents Act, 1988 (Eng.).

n250. *Id.* at ch. 48 Pt. I c. II s. 16.

n251. *Id.* at ch. 48 Pt. I c. II s. 16(3)(a).

n252. *Re: Elvis Presley Trade Marks, Inc.*, [1997] R.P.D.T.M.C. 543 (Ch.) (Eng.).

n253. Hayley Stallard, *The Right of Publicity in the United Kingdom*, 18 *Loy. L.A. Ent. L. Rev.* 565, 567 (1998).

n254. *Id.* at 566 (citing *Du Boulay v. Du Boulay*, [1896] L.R. 2 P.C. 430).

n255. *Id.* at 567 (citing *Re: Elvis Presley Trade Marks*, [1997] R.P.D.T.M.C. 543).

n256. *Bauman v. Fussell*, [1978] R.P.D.T.M.C. 485 (A.C.) (Eng.).

n257. *Stallard*, *supra* note 253, at 568; see *Ladbroke Ltd. v. Hill Ltd.*, (1964) 1 W.L.R. 273, 276-78 (H.L.) (Eng. 1964).

n258. *Stallard*, *supra* note 253, at 568; see *Ladbroke Ltd. v. Hill Ltd.*, (1964) 1 W.L.R. 273, 276-78 (H.L.) (Eng. 1964).

n259. Trade Marks Act, 1994, c. 26, § 1(d) (Eng.).

n260. *Fisher*, *supra* note 13, at 108.

n261. *Stallard*, *supra* note 253, at 569.

n262. *Re: Elvis Presley Trade Marks, Inc.*, [1997] R.P.D.T.M.C. 543 (Ch.) (Eng.).

n263. *Stallard*, *supra* note 253, at 569.

n264. *Re: Elvis Presley Trade Marks*, [1997] R.P.D.T.M.C. at 554.

n265. *Lyngstad v. Anabas Prods. Ltd.*, [1977] F.S.R. 62 (Ch.) (Eng.).

n266. *Fisher*, *supra* note 13, at 108 (citing *Lyngstad*, [1977] F.S.R. at 66).

n267. *Lyngstad*, [1977] F.S.R. at 67-68.

n268. *Stallard*, *supra* note 253, at 570.

n269. Julie King, *The Protection of Personality Rights for Athletes and Entertainers Under English Intellectual Property Law: Practical Difficulties in Relying on an Action of Passing Off*, 7 *Sports Law. J.* 351, 353-354 (2000) (quoting *Perry v. Truefitt*, (1842) 6 *Beav.* 66, 73, 49 *Eng. Rep.* 749, 752).

n270. *King*, *supra* note 269, at 354.

n271. King, *supra* note 269, at 354.

n272. Stallard, *supra* note 253, at 578.

n273. See, e.g., *Saville Perfumery Ltd. v. June Perfect Ltd.*, (1941) 58 R.P.C. 147, 162; Stallard, *supra* note 253, at 567.

n274. Stallard, *supra* note 253, at 569.

n275. *Halliwell v. Panini SpA*, (1997) LEXIS June 6, 1997 (Ch.) (Eng.).

n276. Stallard, *supra* note 253, at 572.

n277. Stallard, *supra* note 253, at 572.

n278. *Reckitt & Colman Prods. v. Borden, Inc.*, (1990) 1 W.L.R. 491 (H.R.) (Eng.).

n279. King, *supra* note 269, at 360.

n280. King, *supra* note 269, at 366-67.

n281. See generally King, *supra* note 269, at 360.

n282. King, *supra* note 269, at 360.

n283. King, *supra* note 269, at 372-73.

n284. See *supra* note 9 and accompanying text.

n285. Elisabeth Logeais & Jean-Baptiste Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, 18 *Loy. L.A. Ent. L. Rev.* 511 (1998).

n286. Dougherty, *supra* note 1, at 435.

n287. Code civil [C. civ.] art. 1382 (Fr.); See Logeais & Schroeder, *supra* note 285, at 514.

n288. See Logeais & Schroeder, *supra* note 285, at 513.

n289. Logeais & Schroeder, *supra* note 285, at 513 (citing Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 *Tul. L. Rev.* 1219, 1228 (1994)).

n290. See text accompanying notes 300-06.

n291. Tribunal de premiere instance [T.P.I.] [ordinary court of original jurisdiction] Seine, June 16, 1858, D.P.III 1858, 62 [hereinafter *Rachel Affair*].

n292. Logeais & Schroeder, *supra* note 285, at 514.

n293. Logeais & Schroeder, *supra* note 285, at 514 (citing *Rachel Affair*, *supra* note 291, as translated by Hauch, *supra* note 289, at 1233).

n294. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, ord. ref., Feb. 27, 1970, JCP 1970, II, 16293 [hereinafter *Pappilon Case*].

n295. *Id.*; See Logeais & Schroeder, *supra* note 285, at 515. It is also interesting to note the similarities in the court's decision on bifurcating the picture's uses with the U.S. court's holding in *Tellado*. Compare *Pappilon Case*, Paris, ord. ref., Feb. 27, 1970, JCP 1970, II, 16293, with *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904 (D.N.J. 1986). See also *supra* note 191 and accompanying text.

n296. Logeais & Schroeder, *supra* note 285, at 517 (emphasis added).

n297. Logeais & Schroeder, *supra* note 285, at 517 (citing Cour d'appel [CA] [regional court of appeal] Paris, Sept. 10, 1996, R.D.P.I. 1996, n.68, 63 [*Les Editions du Sand & Pascuito v. Kantor*]).

n298. Logeais & Schroeder, *supra* note 285, at 517-18.

n299. Logeais & Schroeder, *supra* note 285, at 511 n.1.

n300. Logeais & Schroeder, *supra* note 285, at 519-20.

n301. Logeais & Schroeder, *supra* note 285, at 519.

n302. Logeais & Schroeder, *supra* note 285, at 519.

n303. Logeais & Schroeder, *supra* note 285, at 520.

n304. Logeais & Schroeder, *supra* note 285, at 521.

n305. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Dec. 21, 1983, D. 1984, *Somm.* 331.

n306. Logeais & Schroeder, *supra* note 285, at n.102.

n307. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 3e ch., Feb. 24, 1976 (available in Francois Greffe, *La Publicite et la Loi* [Publicity and Law] 214 (1994)).

n308. Logeais & Schroeder, *supra* note 285, at n.46.

n309. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Dec. 3, 1975, D. 1977, 211, note Lindon; Logeais & Schroeder, *supra* note 285, at n.47.

n310. See Logeais & Schroeder, *supra* note 285, at 521-22, 524-25.

n311. See Dougherty, *supra* note 1, at 435; Silvio Martuccelli, *The Right of Publicity Under Italian Civil Law*, 18 *Loy. L.A. Ent. L. Rev.* 543, 544-46 (1998).

n312. See text accompanying notes 125-30.

n313. Silvio Martuccelli, *The Right of Publicity Under Italian Civil Law*, 18 *Loy. L.A. Ent. L. Rev.* 543, 546 (1998) (citing C.c. (Delle Persone e della famiglia) [Persons and the Family] arts. 6 and 7, translated in 1 *Italian Civil Code and Contemporary Legislation* bk. 3, tit. I, arts. 6 and 7).

n314. Martuccelli, *supra* note 313, at 546-47.

n315. Martuccelli, *supra* note 313, at 547 (citing C.c. (Delle Persone e della famiglia) [Persons and the Family] art. 10, translated in 1 *Italian Civil Code and Contemporary Legislation* bk. 3, tit. I, art. 10).

n316. See Guido Alpa, *The Protection of Privacy in Italian Law: Case Law in a Codified Legal System*, 12 *Tul. Eur. & Civ. L.F.* 1, 4-5 (1997).

n317. See Martuccelli, *supra* note 313, at 547.

n318. Martuccelli, *supra* note 313, at 547.

n319. Martuccelli, supra note 313, at 547.

n320. See text accompanying note 12.

n321. Martuccelli, supra note 313, at 549 (citing Pret. Di Roma, 18 apr. 1984, Foro It. 1984, I, 2030 (with comment of Pardoesi); Giur. It. 1985, I, 2, 453 (with comment of Dogliotti, Alcune questioni in tema di notorieta, diritto all'immagine e tutela della personalita [Some Issues about Notoriety, Right of Image and Protection of Personality]).

n322. Martuccelli, supra note 313, at 549.

n323. Martuccelli, supra note 313, at 549.

n324. Martuccelli, supra note 313, at 544.

n325. Martuccelli, supra note 313, at 549-50.

n326. Martuccelli, supra note 313, at 550.

n327. See Martuccelli, supra note 313, at 550-51.

n328. See Martuccelli, supra note 313, at 551-52.

n329. See Martuccelli, supra note 313, at 552 (citing Pret. di Roma, 18 feb. 1986, Il diritto di autore 1986, 215).

n330. See Martuccelli, supra note 313, at 552-53 (citing Pret. di Roma, 6 July 1987, Il diritto di autore 1987, 570).

n331. Martuccelli, supra note 313, at 552-53.

n332. Martuccelli, supra note 313, at 555-56

n333. Martuccelli, supra note 313, at 555-56.

n334. See generally Guido Alpa, The Protection of Privacy in Italian Law: Case Law in a Codified Legal System, 12 Tul. Eur. & Civ. L.F. 1, 16-17 (1997).

n335. Martuccelli, *supra* note 313, at 552-53.

n336. Martuccelli, *supra* note 313, at 561.

n337. See Guillermo Cabanellas, *The Right of Publicity Under Argentine Law*, 18 *Loy. L.A. Ent. L. Rev.* 449, 450 (1998).

n338. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810, (Dec. 10, 1948), reprinted in *Digest of International Law*, 5 *Whiteman Digest* β 16, at 237-43 (1965).

n339. American Declaration on Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, reprinted in *Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System*, Report No. 18 OEA/Ser. L.V./ II.82, doc. 6 rev. 1 (1992).

n340. Const. Arg. art. 19.

n341. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810, (Dec. 10, 1948), reprinted in *Digest of International Law*, 5 *Whiteman Digest* β 16, at 237-43 (1965); American Declaration on Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, reprinted in *Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System*, Report No. 18 OEA/Ser. L.V./ II.82, doc. 6 rev. 1 (1992).

n342. Cabanellas, *supra* note 337, at 453.

n343. Cabanellas, *supra* note 337, at 455.

n344. Law No. 11723, Sept. 28, 1933 [MCMXX-MCMX] A.D.L.A. 450.

n345. Cabanellas, *supra* note 337, at 454.

n346. Cabanellas, *supra* note 337, at 454.

n347. Cabanellas, *supra* note 337, at 454.

n348. Cabanellas, *supra* note 337, at 454-55.

n349. Cabanellas, *supra* note 337, at 463.

n350. Law No. 22362, art. 3(h), Dec. 26, 1980, [1981-A] A.L.J.A. 8.

n351. Cabanellas, supra note 337, at 455.

n352. Cabanellas, supra note 337, at 455.

n353. Cabanellas, supra note 337, at 455.

n354. Cod. Civ. art. 1071-bis.

n355. Cabanellas, supra note 337, at 458 (citing Cod. Civ. art. 1071-bis).

n356. Corte Suprema de Justicia de la Nacion [CSJN], 11/12/1985, "Ponzetti de Balbin v. Editorial Atlandia," La Ley [L.L.] (1985-B-114) (Arg.)

n357. Cabanellas, supra note 337, at 458.

n358. Cabanellas, supra note 337, at 458 (citing Mosset Iturraspe, Broma, Chanza o Burla Mortificante, [1981-D] L.L. 447).

n359. Cabanellas, supra note 337, at 458 (citing Bidart Campos, Una Condena al Sensacionalismo Periodistico por Agraviar la Privacidad de Una Persona, 136 E.D. 236 n.3 (1990)).

n360. Cabanellas, supra note 337, at 453.

n361. Cabanellas, supra note 337, at 454.

n362. Dougherty, supra note 1, at 436.

n363. Deborah Fisch Nigri & Silvia Regina Dain Gandelman, The Right of Publicity in the Brazilian Legal System, 18 Loy. L.A. Ent. L. Rev. 469, 474 (1998) (citing Constituicao Federal [Federal Constitution], C.F. art. 5, β X (1988) (Braz.)).

n364. Nigri & Gandelman, supra note 363, at 474.

n365. Nigri & Gandelman, supra note 363, at 474.

n366. Nigri & Gandelman, supra note 363, at 471.

n367. Nigri & Gandelman, supra note 363, at 472.

n368. S.T.J., RE 19.151-RJ No. 92004399-2, Relator: Athos Cameiro, 17.11.1992, D.A. 17.12.92, 100 (Brazil).

n369. Nigri & Gandelman, supra note 363, at 473.

n370. See Nigri & Gandelman, supra note 363, at 473-74.

n371. Constituicao Federal [Federal Constitution], C.F. art. 5, § XXVIII(a).

n372. Nigri & Gandelman, supra note 363, at 476-77.

n373. Nigri & Gandelman, supra note 363, at 476-77.

n374. Nigri & Gandelman, supra note 363, at 476.

n375.Codigo Brasileiro de Auto-Regulamentac o Publicitaria [CBAP] ch. 1, 1980.

n376. Nigri & Gandelman, supra note 363, at 478-79.

n377. Nigri & Gandelman, supra note 363, at 476-78.

n378. See Law No. 8.078, C.C. art. 37.

n379. Nigri & Gandelman, supra note 363, at 479.

n380. Nigri & Gandelman, supra note 363, at 478-79.

n381. See Nigri & Gandelman, supra note 363, at 479.

n382. Nigri & Gandelman, supra note 363, at 480.

n383. See text accompanying notes 11-12.

n384. Nigri & Gandelman, supra note 363, at 480 (citing T.J.G., No. 37524, Relator: Basileu Ribeiro Filho, 06.05.1975).

n385. Nigri & Gandelman, supra note 363, at 482.

n386. Nigri & Gandelman, *supra* note 363, at 484 (citing T.J.R.J., No. 1186-25, Relator: Wellington Moreira Pimentel, 07.02.1985, Unreported).

n387. Nigri & Gandelman, *supra* note 363, at 484 (citing T.J.R.J., No. 1186-25, Relator: Wellington Moreira Pimentel, 07.02.1985, Unreported).

n388. Nigri & Gandelman, *supra* note 363, at 478.

n389. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988).

n390. *Id.* at 463-64.

n391. Nigri & Gandelman, *supra* note 363, at 479.

n392. Nigri & Gandelman, *supra* note 363, at 479.

n393. Nigri & Gandelman, *supra* note 363, at 479.

n394. Robert G. Howell, *Publicity Rights in the Common Law Provinces of Canada*, 18 *Loy. L.A. Ent. L. Rev.* 487, 488 (1998).

n395. Howell, *supra* note 394, at 490.

n396. Howell, *supra* note 394, at 488.

n397. Howell, *supra* note 394, at 488.

n398. Howell, *supra* note 394, at 488.

n399. Robert G. Howell, *The Common Law Appropriation of Personality Tort*, 2 *Intell. Prop. J.* 149, 153-54 (1986) (Can.).

n400. See Howell, *supra* note 394, at 490-91.

n401. Howell, *supra* note 394, at 491; see *Krouse v. Chrysler Canada Ltd.*, [1973] 1 *O.R.2d* 225 (Can.).

n402. Krouse, [1973] 1 O.R.2d 225 (Can.); Athans v. Canadian Adventure Camps, Ltd., [1977] 17 O.R.2d 425 (Can.).

n403. Krouse, [1973] 1 O.R.2d 225 (Can.).

n404. Id.

n405. Id. The court also stated that the plaintiff should expect "some minor loss of privacy and even some loss of potential for commercial exploitation ... as a by-product of the express or implied license to publicize the institution of the game itself." Id.

n406. Athans, [1977] 17 O.R.2d 425 (Can.).

n407. Id.

n408. Id.

n409. Howell, supra note 394, at 492-93.

n410. Joseph v. Daniels, [1986] 4 B.C.L.R.2d 239 (Can.).

n411. Id. P 15.

n412. Howell, supra note 394, at 494-95.

n413. See supra Part II.A.

n414. See, e.g., Lyngstad v. Anabas Prods. Ltd., [1977] F.S.R. 62, 66 (Ch.) (Eng.).

n415. See generally Dougherty, supra note 1, at 421.

n416. European Convention on Human Rights β 1, art. 8, Jan. 20, 1966, available at <http://www.echr.coe.int/ECHR> (follow "Basic Texts" hyperlink; then follow "English" hyperlink).

n417. P.G. & J.H. v. United Kingdom, App. No. 44787/98, P 56 (Eur. Ct. H.R., Sept. 25, 2001), available at <http://www.echr.coe.int/ECHR> (follow "HUDOC" hyperlink; then follow "Access Hudoc Collection" hyperlink; then search for Application Number "44787/98"). In this case, the applicants complained that covert listening devices had been used to record conversations at a flat while they were detained in a police station. Thereafter, that information was obtained by the police and

used in part of a police report that was, thereafter, used in evidence in their trial. Furthermore, the tape and the police report had not been disclosed to the defense at their trial and that the judge had heard evidence from the police officer concerned in the absence of the defendants. Basil Markesinis et al., *Concerns and Ideas about the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 *Am. J. Comp. L.* 133, 182 (2004).

n418. Logeais & Schroeder, *supra* note 285, at 513.

n419. European Convention on Human Rights, *supra* note 416,  $\beta$  1, art. 8.

n420. Human Rights Bill, as approved by the House of Lords, 577 *Parl. Deb.*, H.L. (5th ser.) (1997) 1726, introduced into the House of Commons, Feb. 6, 1998, 663 *Parl. Deb.*, H.C. (5th ser.) (1998) 31, available in United Kingdom Parliament (visited Apr. 10, 1998), available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>.

n421. See Markesinis et al., *supra* note 417, at 141.

n422. See Markesinis et al., *supra* note 417, at 141.

n423. See Stallard, *supra* note 253, at 585.

n424. *Douglas v. Hello! Ltd.*, (2001) 2 *W.L.R.* 992 (A.C.); *Douglas v. Hello! Ltd.*, [2003] *E.W.H.C.* 786 (Ch.); Markesinis et al., *supra* note 417, at 141.

n425. *Douglas v. Hello! Ltd.*, (2001) 2 *W.L.R.* 992 (A.C.); *Douglas v. Hello! Ltd.*, [2003] *E.W.H.C.* 786 (Ch.); Markesinis et al., *supra* note 417, at 141.

n426. See Markesinis et al., *supra* note 417, at 141.

n427. See Lauren B. Cardonsky, *Towards a Meaningful Right to Privacy in the United Kingdom*, 20 *B.U. Int'l L.J.* 393, 410-11 (2002).

n428. See generally Kwall, *supra* note 57; Hamilton et al., *supra* note 14.

n429. The Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1886, 1161 *U.N.T.S.*3 (as amended on Sept. 28, 1979), available at <http://www.wipo.int/treaties/en/ip/berne/index.html>.

n430. Paul Goldstein, *International Legal Materials on Intellectual Property* 174-197 (Foundation Press 2002).

n431. WIPO Performances and Phonograms Treaty, art. 5, Dec. 20, 1996, 36 I.L.M. 76 (1997), available at <http://www.wipo.int/treaties/en/ip/wppt/trtdocs wo034.html>.

n432. Roberta Rosenthal Kwall, Intellectual Property Challenges in the Next Century: Preserving Personality and Reputational Interests of Constructed Personas through Moral Rights: A Blueprint for the Twenty-First Century, 2001 U. Ill. L. Rev. 151, 157 (2001).

n433. Kwall, *supra* note 432, at 157.

n434. WIPO, Basic Proposal for the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances (Aug. 1, 2000), at 15-17, <http://www.wipo.int/documents/en/document/iavp/pdf/iavp dc3.pdf> (last visited Feb. 14, 2007).

n435. See *id.*

n436. David Nimmer, Essay, The End of Copyright, 48 Vand. L. Rev. 1385, 1393 (1995).

n437. Nimmer, *supra* note 436, at 1393.

n438. Nimmer, *supra* note 436, at 1393.

n439. Nimmer, *supra* note 436, at 1393 (citing Emery Simon, GATT and NAFTA Provisions on Intellectual Property, 4 Fordham Intell. Prop. Media & Ent. L.J. 267, 270 (1993)).

n440. Nimmer, *supra* note 436, at 1393.

n441. Nimmer, *supra* note 436, at 1393.

n442. Monique L. Cordray, GATT v. WIPO, 76 J. Pat. & Trademark Off. Soc'y 121, 131 (1994).

n443. See Trade Act of 1974, 19 U.S.C. § 2242 (2006), available at <http://uscode.house.gov/download/pls/19C12.txt>.

n444. See Alain Lapter, The WTO's Dispute Resolution Mechanism: Does the United States Take it Seriously? A TRIPs Analysis, 4 Chi.-Kent J. Intell. Prop. 217 (2005); Agreement on Trade-Related Aspects of International Property Rights, Apr. 15 1994, 33 I.L.M. 81 [hereinafter TRIPs], available at <http://www.wto.org/english/docs e/legal e/27-trips 02 e.htm>.

n445. TRIPs, supra note 444, art. 9, available at <http://www.wto.org/english/docs e/legal e/ 27-trips 04 e.htm#1>.

n446. TRIPs, supra note 444, art. 15(1), available at <http://www.wto.org/english/docs e/legal e/ 27-trips 01 e.htm> (emphasis added).

n447. TRIPs, supra note 444, art. 16, available at <http://www.wto.org/english/docs e/legal e/ 27-trips 01 e.htm>.

n448. See text accompanying notes 436-37.

n449. See generally Lapter, supra note 444, at Part II (discussing the TRIPs dispute resolution mechanism under the WTO).

n450. See generally Lapter, supra note 444, at Part II (discussing the TRIPs dispute resolution mechanism under the WTO).