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NOTES

A NEW APPROACH TO AN ENTERTAINER'S
RIGHT OF PERFORMANCE

I. INTRODUCTION

The Copyright Act of 1976\(^1\) protects authors' writings embodied in tangible form whether or not they are published.\(^2\) The Act does not encompass performing artists' rights in unrecorded, live performances.\(^3\) Accordingly, performers must resort to state law for protection of aesthetic and commercial performance interests. Present state law, however, inadequately protects against unauthorized appropriation of live performances.

One major problem in obtaining state law protection of performances is the lack of a universally recognized definition of a protectible performance.\(^4\) Courts find that various elements compose a performance. The expression of the performer's style is the heart of a performance.\(^5\) The style may be the use of a certain characterization or the way one sings or acts. It may range from a concrete identification of a performer with certain dress or mannerisms\(^6\) to a more elusive situation in which there is no identification of the style with any type of character at all.\(^7\) The author must express the style in a performance because the

3. Creative works not fixed in any tangible medium of expression are not "writings" within the scope of the Act. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.08[C][2] (1981); see notes 25-52 infra and accompanying text.
4. See notes 6-11 infra and accompanying text.
5. "The individual performance . . . is the expression of the style/idea. It is that performance which is the property to which legal rights must attach to protect the performing artist, not the style of delivery." Lang, Performance and the Right of the Performing Artist, 21 ASCAP COPYRIGHT L. SYMP. 69, 95 (1974). See also Mazer v. Stein, 347 U.S. 201, 217 (1954); Holmes v. Hurst, 174 U.S. 82, 86 (1899); Welles v. CBS, 308 F.2d 810, 814 (9th Cir. 1962); 1 M. NIMMER, supra note 3, § 1.01[B][2][C]; Note, An Author's Artistic Reputation Under the Copyright Act of 1976, 92 HARV. L. REV. 1490, 1507 (1979).
style or character as an idea is not protectible against imitation alone. Thus, the performance is the particular rendition of a song or character that expresses the performer's style. The Copyright Act of 1976 does not protect this performance unless it is fixed in a tangible form such as on recordings or films.

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


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

Prior to 1972, copyright laws did not protect phonograph records from piracy. However, the passage of Pub. L. 92-140, 85 Stat. 391 (1971) protected recordings copyrighted after that year. The Supreme Court upheld state statutes protecting records and tapes from piracy if made before 1972 in Goldstein v. California, 412 U.S. 546 (1973). The 1976 Copyright Act further elaborated
former desires to protect. A performer has both intangible and commercial interests in his performance. The performer's basic intangible interest is reputation. Reputation is attained by developing, through expenditures of time, skill, and money, a style, unique rendition, or character to which the public gives special recognition. Courts are unwilling, however, to protect creators' interests in their reputations alone—their "moral rights." This unwillingness is not fatal, however, because the performer's reputation interest largely depends on the marketability of his performances. The result is a merger of the intangible and commercial interests. Effective protection of commercial interests will correspondingly enhance intangible interests.

A performer's success depends upon his ability to exploit commercial endorsement and guest appearances. See generally Note, Performers' Rights Under the General Revision of the Copyright Law, 28 Case W. Res. L. Rev. 766 (1978).

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

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

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

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


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

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

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


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


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

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

II. FEDERAL COPYRIGHT PROTECTION

A. Live Performance Copyright Protection

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

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23. Comment, supra note 22, at 819.
24. Because of the difficulty of defining a performance, an examination of four common fact patterns involving performers is the best method for bringing into sharp focus the inadequacy of current legal protection for performances. In each scenario the entertainer develops a creative product that another person uses without the entertainer's authorization. Although the situations vary slightly, each is illustrative of common problems entertainers face in protecting their performance rights. Each example also presupposes that no express contract exists between the performer and the appropriator and that the performances are live and unrecorded.
25. The subject matter provision of the 1976 Act states, in pertinent part:

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

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

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

26. The legislative history indicates that

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

H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 51 (1976) [hereinafter cited as HOUSE REPORT]. Thus, the copyright "originality" concept differs from the "novelty" standard applied in the patent
Unrecorded live performances do not satisfy the fixation requirement and are, therefore, not protected under the Act. The stringent fixation requirement for live performances severely limits the availability of federal copyright protection for most performers.

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

B. Copyright Preemption Concerns

Resolution of the threshold subject matter inquiry is also necessary to determine whether state law remedies are preempted. Section 301 of the 1976 Act delineates the scope of federal copyright preemption.
Any state law that protects the same subject matter and creates rights additional or equivalent to the exclusive rights in the Act is circumscribed. Thus, courts employ a two-tiered preemption analysis. The subject matter prong is determined by reference to Section 102. Although section 102 is not an exclusive list of copyright matter, its flexibility is designed to accommodate technical innovation. Following a determination that the work is within the subject matter of copyright and is fixed in a tangible medium of expression, the courts then examine whether the rights the performer seeks to vindicate qualify for copyright protection. As previously indicated, the Act does not cover

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

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

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

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

*Id.*

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


33. See note 25 supra and accompanying text.

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


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

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

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

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
live, unrecorded performances. Therefore, the equivalent rights prong is irrelevant in that context. Both section 301(b)(1) and the Act’s legislative history recognize this exemption from federal preemption. State remedies purporting to protect simultaneously recorded and transmitted performances, however, are preempted if equivalent rights are provided.

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


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

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

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

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


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


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

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


44. In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the
Even prior to the enactment of the 1976 Act the Supreme Court held that the Copyright Act of 1909 was not exclusive. States could legislate with regard to works beyond the scope of the 1909 Act. Early Supreme Court decisions precluded state unfair competition laws that protected works omitted from the federal laws and deemed the federal copyright and patent laws exclusive. In 1973, however, the Court in *Goldstein v. California* concluded that the federal copyright law did not preempt a California antipiracy statute for tapes and records. *Goldstein* held that Congress' power under the Copyright Clause was not exclusive and that states could protect those areas the federal copyright act left unattended.

In 1977 the Court in *Zacchini v. Scripps-Howard Broadcasting Co.* recognized the existence of concurrent state protection for works not within the constitutional scope of copyright. *Zacchini* recognized the right of a performer to assert a common-law right of publicity to redress an appropriation of his entire performance by the television news media. Although the Court did not discuss the question whether principal areas of protection that preempting would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, that preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal copyright statute.

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48. Id. at 571.
49. [The language of the Constitution neither explicitly precludes the States from granting copyrights nor grants such authority exclusively to the Federal Government. . . . No reason exists why Congress must take affirmative action either to authorize protection of all categories of writings or to free them from all restraint. We therefore conclude that, under the Constitution, the states have not relinquished all power to grant to authors “the exclusive Right to their respective Writings.”]
51. Id. at 577.
Zacchini could copyright his act, it recognized the ability of a state to protect live, unrecorded performances. In both *Goldstein* and *Zacchini*, the Court declined to consider the subject matter within the patent or copyright laws.

III. STATE LAW PROTECTION

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

A. Common-Law Copyright: The Nightclub Performer

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

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

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

52. *Id.*
54. *See* notes 59-71 *infra* and accompanying text.
55. *See* notes 78-122 *infra* and accompanying text.
56. *See* notes 123-46 *infra* and accompanying text.
57. *See* notes 147-70 *infra* and accompanying text.
58. Although only one fact pattern will be used to explore each area of state law, these legal theories are not mutually exclusive and may be combined in any cause of action.
59. *See* notes 25-27 & 29-38 *supra* and accompanying text.
60. *See* notes 27-28 *supra* and accompanying text.
61. 1 M. Nimmer, *supra* note 5, § 1.01[A].
entitled him to relief against any unconsented appropriation of his work. Upon publication, the author either obtained a federal copyright or permitted dedication of his work into the public domain. The 1976 Act eliminates this dichotomy and protects both published and unpublished writings. Because a live, unrecorded performance is not a writing, the 1976 Act does not bar state relief for the nightclub performer's claim.

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


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

64. 17 U.S.C. § 301 (1978). Federal copyright protection is therefore given to all works, published or unpublished. To sue for infringement of the copyright the work must be registered, but the cause of action may arise while the work is unpublished. See 17 U.S.C. §§ 408-412 (Supp. III 1979).

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


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

68. 1 M. Nimmer, supra note 3, § 2.02.


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

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

\section*{B. The Right of Publicity: The Marketability of a Reputation}

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

\begin{itemize}
\item \footnote{71} 1 M. Nimmer, \textit{supra} note 3, \textsection 1.03[A].
\item \footnote{72} 17 U.S.C. \textsection 301 (Supp. III 1979).
\item \footnote{73} Cal. Civ. Code \textsection 983(a) (Deering 1971).
\item \footnote{74} Burke v. NBC, 598 F.2d 688, 691 (1st Cir. 1979).
\item \footnote{75} The United States Supreme Court, in Ferris v. Frohman, 223 U.S. 424, 435 (1911), held that "[a]t common-law, the public performance of [a] play is not an abandonment of it to public use." See Burke v. NBC, 598 F.2d 688 (1st Cir. 1979) (granting one person's request to use film for television not publication allowing another company to use film); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955) (sale of records to public not dedication to the public); King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963) (speech before crowd not publication); Lennon v. Pulsebeat News, Inc., [1964] 143 U.S.P.Q. (BNA) 309 (N.Y. Sup. Ct.) (public interviews not publication or abandonment of ownership); CBS v. Documentaries Unlimited, Inc., 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964) (rendering of performance before microphone not an abandonment of ownership or dedication to the public).
\item \footnote{76} [I]t would be absurd to consider performance publication with regard to the performer while at the same time recognizing in him a property right in his performance. This would mean that the very act essential to creation would at the same time operate to destroy the right. It would follow that the performer retains his property right in the live ephemeral performance.
\item \footnote{77} 1 M. Nimmer, \textit{supra} note 3, \textsection 2.02.
\end{itemize}
sell a product. The actor, finding that this irreparably damages the marketability of his reputation, desires compensation for this unauthorized use of his name, likeness, or personality.

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

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

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

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

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

81. The right of privacy is the right of an individual "to be let alone"—free from unwarranted intrusions into his private life. See E. KINOTNER & J. LAHR, AN INTELLECTUAL PROPERTY
pensates for injury to feelings or emotional distress\(^\text{83}\) resulting from “commercial appropriation of elements of personality.”\(^\text{84}\) The right of privacy is a personal right that is neither assignable nor descendible.\(^\text{85}\) Damages are awarded only for a highly offensive intrusion into a person’s life.\(^\text{86}\) Moreover, the right of privacy contains a waiver doctrine.


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

\(^\text{83}\) \emph{RESTATEMENT (SECOND) OF TORTS} § 652H (1977):

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

(a) the harm to his interest in privacy resulting from the invasion;

(b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and

(c) special damage of which the invasion is a legal cause.

\(^\text{84}\) See, e.g., Colgate-Palmolive Co. v. Tullos, 219 F.2d 617 (1st Cir. 1955); McCreery v. Miller’s Grocerteria, 99 Colo. 499, 64 P.2d 803 (1936).

\(^\text{85}\) Only the person whose privacy is invaded may assert the right of privacy. James v. Screen Gems, Inc., 174 Cal. App. 2d 650, 653, 344 P.2d 799, 801 (1959); E. Kintner & J. Lahr, \emph{supra} note 81, at 452; \emph{Restatement (Second) of Torts} § 652F, Comment a (1977); Note, \emph{Performer’s Right of Publicity, supra} note 78, at 598. See also Maritote v. Desilu Prods., 345 F.2d 418 (9th Cir. 1965); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

\(^\text{86}\) \emph{RESTATEMENT (SECOND) OF TORTS}, §§ 652B, D & E (1977); Prosser, \emph{supra} note 81, at 391.

that bars public figures from recovering for unconsented appropriations of name, likeness, or personality.\(^{87}\)

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

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

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

\(^{90}\) E. KINTNER & J. LAHR, supra note 81, at 459; Nimmer, supra note 78, at 204; Pipel, supra note 82, at 252.

\(^{89}\) See notes 106-15 infra and accompanying text.

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

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

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

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94. Id. at 869.

95. In addition to and independent of that right of privacy . . . , a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else.

Id. at 868.
protection a performer's proprietary interest in his reputation. The reputation in this context is adjunct to the property interest in the likeness because it is actually responsible for the marketable publicity value of the name, likeness, or personality. Under this theory, courts also grant relief for inducing the breach of an exclusive contract with a well-known personality or appropriating the name, likeness, photograph, or performance of a personality without permission.

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

98. "Financial success in the exploitation of a celebrity's name or portrait is attained only when the corporation or advertising agency possesses a right to the use of that name or portrait." E. KINTNER & J. LAHR, supra note 81, at 452-53.
99. As one commentator suggests, "[a]udience appeal is a principal stock-in-trade of a celebrity." Treece, supra note 78, at 64.
100. Id. The surrender of the privacy right entitles the entertainer to whatever financial benefits are gained from his performances.
101. Id.
102. Treece, supra note 78, at 646.
Unauthorized use of publicity characteristics constitutes an interference with future contracts. An advertiser appropriating an actor's personality characteristics without his consent may be liable to the actor for the commercial advertising value of the name, likeness, or personality. To recover, the actor need only show an unconsented use. It is not necessary that the advertiser use the characteristics for "advertising purposes" or for "purposes of trade." The difficulty of proving damages in nonadvertising cases, however, may operate either to limit recovery to actual loss suffered or force the actor to seek equitable relief.

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


104. E. KINTNER & J. LAHR, supra note 81, at 449. A number of states have codified the right of privacy. See, e.g., CAL. CIV. CODE § 3344 (Deering 1972); MASS. GEN. LAWS ANN. ch. 214, § 3A (West Supp. 1976); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); OKLA. STAT. ANN. tit. 21, § 859.1-3 (West Supp. 1980); VA. CODE § 18.2-216.1 (Supp. 1980).

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

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


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

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

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

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


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

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

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

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


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

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


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

120. Id. at 576.
The successful actor will also find that the right of publicity protects his underlying performance as well as personality characteristics. The actor's success in attracting audiences to his performances reflects the publicity value attached to his name, likeness, and personality. In *Zacchini*, the Court stated that "the appropriation of the very activity by which the entertainer acquired his reputation in the first place" is the strongest case for the right of publicity. Consequently, the actor who has had his name, likeness, personality, or performance appropriated will recover, in most instances, for violation of the right of publicity.

C. *Passing Off: Stealing a Character*

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

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

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122. 433 U.S. at 576.


125. The performer creating the character may recover for the unauthorized use under "passing off" upon a showing that his character acquired a secondary meaning, the advertiser's imita-
The performer's success in recovering for an unauthorized use of his distinctive character will largely depend upon the degree of connection in the public mind between the performer and the actual performance. This public connection creates the performer's protectible interest in the character. The protectible interest is the goodwill or secondary meaning that inures to the character as a result of the performer's investment of time, energy, and money in developing a market for his product.

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

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

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Notes:


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

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

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


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

\textsuperscript{136} \textit{See} notes 137-41 \textit{infra} and accompanying text.

\textsuperscript{137} 93 Cal. App. 358, 269 P. 544 (1928).

\textsuperscript{138} \textit{Id.} at 364, 269 P. at 546.

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

\textsuperscript{140} \textit{Id.} at 360, 269 P. at 545.
ered for an unconsented use of an imitation of a performer’s unique voice.141

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

D. Misappropriation: Whose Joke Is It?

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

142. See note 128 supra.

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

144. See note 101 supra and accompanying text.

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

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

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

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

147. The United States Supreme Court first recognized misappropriation in International News Service (INS) v. Associated Press, 248 U.S. 215 (1918). In INS the Court held that it was an act of unfair competition for a rival news service to take plaintiff news organization's posted material and use it to gain a competitive advantage over plaintiff. Id. at 236. The Court decided the INS case prior to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and thus it does not constitute binding precedent on the issue of misappropriation. State courts, however, have adopted the reasoning of the INS Court and have extended the misappropriation doctrine beyond the facts of INS. See, e.g., Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956); Stork Restaurant, Inc. v. Sahati, 166 F.2d 348 (9th Cir. 1948); Veatch v. Wagner, 116 F. Supp. 904 (D. Alaska 1953); Uproar Co. v. NBC, 8 F. Supp. 358 (D. Mass. 1934), cert. denied, 278 U.S. 670 (1936); Capitol Records, Inc. v. Erickson, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969); Capitol Records, Inc. v. Spies, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970); Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), aff'd, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); Mutual Broadcasting Sys., Inc. v. Muzak Corp., 177 Misc. 485, 30 N.Y.S.2d 419 (Sup. Ct. 1941); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937); Mercury Record Prods., Inc. v. Economic Consultants, Inc., 64 Wis. 2d 163, 218 N.W.2d 705 (1974), cert. denied, 420 U.S. 914 (1975).


cause of action for misappropriation in this context.\textsuperscript{151}

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

Because misappropriation is a competitive tort, the comedian must further prove the existence of some competition\textsuperscript{154} with the appropriating audience member. The competition requirement is loosely inter-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{151} See notes 29-32 \textit{supra} and accompanying text.
\item Moreover, there is much disagreement over whether misappropriation provides equivalent rights to copyright. See note 35 \textit{supra}. The rationale behind the misappropriation remedy is not to grant a monopoly to the creator for his work product, but rather to permit him to benefit from his investment. See Mercury Record Prods., Inc. v. Economic Consultants, Inc., 64 Wis. 2d 163, 175, 218 N.W.2d 705, 710 (1974), cert. denied, 420 U.S. 914 (1975); Note, The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Preemption Doctrine, 71 COLUM. L. REV. 1444 (1971).
\item In CBS v. DeCosta, 377 F.2d 315 (1st Cir.), cert. denied, 389 U.S. 1007 (1967), the court discussed the application of misappropriation to an entertainer's claim. In DeCosta, decided prior to the Copyright Act of 1976, the court denied the performer recovery against a television network that misappropriated the performer's character. The performer claimed that by creating the character role of Paladin, traveling through the country as this character, and passing out cards stating "Have Gun Will Travel," he had developed a protectible property interest that CBS had misappropriated in its television series "Have Gun Will Travel." \textit{Id.} at 316. The court held, however, that the printing of the cards was a publication for purposes of copyright and thus plaintiff waived any rights in the character. \textit{Id.} at 321.
\item If a court decided \textit{DeCosta} today the result might be different, although the action would be copyright infringement and not misappropriation. For later developments in this case, see DeCosta v. CBS, 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976).
\item \textsuperscript{153} See note 152 \textit{supra}.
\item \textsuperscript{154} The creator of the work product may find that the demand for his product has declined as a result of the misappropriation. Thus, the creator actually finds himself competing with his own work product.
\end{itemize}
\end{footnotesize}
It permits recovery for either direct or indirect competition. Consequently, under misappropriation a creator may recover against someone who uses the creator's work product in a different manner or to a different extent than the creator.

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


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


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

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

Id. at 236.


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


163. Id. at 805, 101 N.Y.S.2d at 500.
Thus, the lack of direct competition between performers and the misappropriator did not affect the ability to recover. Courts also grant relief under misappropriation for tape piracy when there is direct competition between the creator and the appropriator.\textsuperscript{164}

Additionally, the misappropriation theory requires the comedian to establish injury as a result of the appropriation.\textsuperscript{165} The unauthorized, uncompensated use must commercially benefit the appropriator. The appropriator is unjustly enriched because he has not invested his own money in the development of the creation and has not compensated the creator for its use. Courts liberally interpret the injury requirement. Relief under misappropriation is predicated on the creator's commercial loss or damaged reputation\textsuperscript{166} and not on deception or likelihood of public confusion.\textsuperscript{167} Performers can recover for injury to professional reputation because of the effect on future commercial success.\textsuperscript{168} Performers can also recover for unauthorized uses of recordings\textsuperscript{169} as well as takings of unique vocal styles for a commercial advertisement.\textsuperscript{170}

The comedian's recovery is easiest under misappropriation. To re-
cover for the unauthorized videotaping of his act, the comedian must show that the appropriator took his property without consent; that this taking injured him, and that indirect competition for the same audience existed at the time.

IV. EFFECTIVENESS OF RELIEF FOR APPROPRIATIONS OF PERFORMANCES

There is no unified law for the right of performance. Piecemeal state law protection of performance interests inadequately compensates entertainers for their contributions and discourages further development of the creative arts. Protection for performers' intangible interests\(^{171}\) is unrealistic because, absent any commercial loss, concrete injury is difficult to prove. The inability of state law effectively to protect performers' commercial interests, therefore, demonstrates the need for reform.\(^{172}\) The following proposed model code provides a uniform right of performance by incorporating the elements of the state actions most protective of performers' commercial interests. Concomitantly, this proposal illustrates the weaknesses in existing state law theories.

V. PROPOSED MODEL CODE FOR RIGHTS OF PERFORMANCE

Section 1: The Right of Performance

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

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

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171. For an explanation of these intangible interests see notes 12-13 supra and accompanying text.
173. All the actions recognize a property interest. See notes 66-71, 90-97, 126-27 & 152-53 supra and accompanying text. The right of publicity compensates for takings of performance byproducts. See notes 78 & 103-04 supra and accompanying text. Passing off contains the public recognition element. See notes 126-27 supra and accompanying text. Finally, misappropriation contains the indirect competition element. See notes 154-64 supra and accompanying text. Additionally, in misappropriation the use need not be deceptive. See note 149 supra and accompanying text.
recovery for unauthorized appropriations.\textsuperscript{174}

The model code recognizes that any public use of the performance commercially injures the creator. It is not limited to deceptive or confusing uses as in “passing off.”\textsuperscript{175} Moreover, it eliminates any direct competition requirement that may hinder a performer’s recovery.\textsuperscript{176} In effect, this section of the code combines the elements of the right of publicity\textsuperscript{177} and misappropriation,\textsuperscript{178} with the added requirement of public recognition. Section 1 follows state law in refusing recovery for injury to reputation alone.\textsuperscript{179} Nevertheless, if commercial loss results, recovery is available.

\textbf{Section 2: Definition of Performance}

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

(1) The concrete creation is the expression of an original style, characterization, or voice.

(2) The concrete creation, to be the property of the entertainer, must result from the investment of time, effort, or money. If such concrete creation occurs the entertainer has complete control over its use. It may be subject to contract or assignment and is descendible.

(3) The byproducts of a performance are the values given the creator’s name, likeness, and personality.

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

Section 2 also includes the “passing off” requirement of secondary

\textsuperscript{174} See notes 73-76, 105-20, 131-35, 142 & 150 supra and accompanying text.
\textsuperscript{175} See notes 128-30 supra and accompanying text.
\textsuperscript{176} See notes 142-45 supra and accompanying text.
\textsuperscript{177} See notes 78-122 supra and accompanying text.
\textsuperscript{178} See notes 147-70 supra and accompanying text.
\textsuperscript{179} See note 13 supra.
\textsuperscript{180} See notes 4-11 supra and accompanying text.
\textsuperscript{181} See notes 8-9 supra and accompanying text.
\textsuperscript{182} See notes 29-38 supra and accompanying text.
meaning. Public association of the performance with the performer is necessary to prove the performers' commercial loss. Under this section distinctive characters as well as concrete performances are protected.

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

Section 3: Infringement of the Right of Performance

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

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

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

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

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

In cases not involving imitation, the code does not require a showing of public deception. Thus, any unconsented use imposing a commercial loss upon a performer is actionable. This provision eliminates the major problem in the "passing off" theory. Moreover, the code's re-
laxation of the direct competition requirement\textsuperscript{188} gives performers greater flexibility in recovering for unconsented appropriations.

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

Section 4: Burden of Proof

(a) To recover under this act the creator must prove:
\begin{enumerate}
\item that the performance was the transformation of the creator's original idea into a concrete creation;
\item that he has not intentionally waived his rights in the performance;
\item that another person has taken the performance without his consent; and
\item that he has suffered commercial losses as a result of the unauthorized use of the performance.
\end{enumerate}

(b) Any person charged with an infringement of the right of performance may defend by proving that the unauthorized use was in furtherance of legitimate overriding first amendment rights.

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

\begin{flushleft}
\textsuperscript{188} See notes 142-45 \textit{supra} and accompanying text.
\textsuperscript{189} See notes 71, 90-97, 103-04, 136-41 & 166-70 \textit{supra} and accompanying text.
\textsuperscript{190} See notes 73-76 \textit{supra} and accompanying text.
\textsuperscript{191} See notes 29-38 \textit{supra} and accompanying text.
\end{flushleft}
Section 5: Relief for Infringement

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

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

(2) Equitable relief in the form of:

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

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

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

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

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


194. For cases on the right of publicity see Price v. Worldvision Enterprises, Inc., 455 F. Supp.
the reasons for granting equitable relief are unclear. Either the performer's right in the performance or the inadequacy of the legal remedy are possible rationales. The injunctive relief does not compensate for past commercial losses. The code permits a performer to recover commercial losses and prevent continued unauthorized use of the performance. Thus, it provides for an accounting and recognizes the restitutionary theory of unjust enrichment.

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

VI. CONCLUSION

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


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

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

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

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

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