### Volume 1

### CHAPTER 1. HISTORY AND DEVELOPMENT OF THE RIGHTS OF PUBLICITY AND PRIVACY

### I. INTRODUCTION TO THE RIGHTS OF PUBLICITY AND PRIVACY

- § 1:1 Introduction
- § 1:2 —Definition and history of the right of publicity
- § 1:3 ——Simple definition of the right of publicity
- § 1:4 ——History of development of publicity and privacy rights
- § 1:5 —Authors' comment: "publicity" rights and "privacy" rights
- § 1:6 What is a right of "privacy"?
- § 1:7 ——"Publicity" law develops from "privacy" law
- § 1:8 —Authors' comment: the contribution of other fields of law

#### II. THE WARREN AND BRANDEIS' ARTICLE

- § 1:9 Early stirrings of the right of privacy
- § 1:10 1890 Warren and Brandeis article
- § 1:11 —Article
- § 1:12 The 1890 Warren and Brandeis article—The myth
- § 1:13 —The myth crumbles
- § 1:14 1890 Warren and Brandeis article—Impact of the article on the law

#### III. EARLY CASE LAW

- § 1:15 Development of the right of privacy
- § 1:16 —New York: the *Roberson* case and its statutory response
- § 1:17 —Proprivacy: the *Pavesich* decision

§ 1:18 —Fallout after Roberson and Pavesich

#### IV. PROSSER'S FOUR TORTS OF PRIVACY

- § 1:19 Prosser's four torts of privacy
- § 1:20 —Prosser's first tort: invasion of privacy by intrusion
- § 1:21 —Prosser's second tort: public disclosure of private facts
- § 1:22 —Prosser's third tort: false light privacy
- § 1:23 —Prosser's fourth tort: invasion of privacy by appropriation
- § 1:24 —Impact of Prosser's four torts and the 1977 Second Restatement of Torts

#### V. CREATION OF THE RIGHT OF PUBLICITY

- § 1:25 Stage is set for the right of publicity
- § 1:26 Birth of the right of publicity

### VI. MODERN DEVELOPMENT OF THE RIGHT OF PUBLICITY

- § 1:27 Nimmer builds the foundation
- § 1:28 Modern development of the right of publicity: 1954 to 1970
- § 1:29 —Development in the 1950s
- § 1:30 —Development in the 1960s
- § 1:31 Modern development of the right of publicity: 1970 to the present
- § 1:32 —1970s: the right of publicity comes of age
- § 1:33 —1977 Zacchini case: the Supreme Court's "shot from a cannon case"
- § 1:34 —Developments in the 1980s and 1990s
- § 1:35 —1995 restatement of unfair competition
- § 1:36 —Developments in the 21st century
- § 1:37 Authors' comment: a retrospective view of the history of the rights of publicity and privacy
- § 1:38 [Reserved]
- § 1:39 Authors' comment: a retrospective view of the history of the rights of publicity and privacy—Why all the fuss?

### CHAPTER 2. POLICY REASONS FOR THE RIGHT OF PUBLICITY

§ 2:1 Natural rights of property justification

xviii

- § 2:2 —Human identity as a self-evident property right
- § 2:3 —"Why not" challenge
- § 2:4 —Free speech criticism
- § 2:5 —Appeal to first principles
- § 2:6 Incentive justification
- § 2:7 Economic justification
- § 2:8 Falsity justification
- § 2:9 Right of self-definition justification

# CHAPTER 3. ELEMENTS OF INFRINGEMENT OF THE RIGHT OF PUBLICITY

### I. A PRIMA FACIE CASE OF INFRINGEMENT OF THE RIGHT OF PUBLICITY

- § 3:1 Outline of a prima facie case
- § 3:2 —Outline
- § 3:3 —Validity
- § 3:4 —Infringement
- § 3:5 —Remedies
- § 3:6 —Defenses

### II. IDENTIFICATION OF THE PLAINTIFF IN PRIVACY AND PUBLICITY LAW

### A. IDENTIFICATION OF THE PLAINTIFF IN PRIVACY LAW

- § 3:7 The "Of and Concerning" Test of Defamation Law
- § 3:8 The "Of and Concerning" Test of privacy law

### B. IDENTIFICATION OF THE PLAINTIFF IN RIGHT OF PUBLICITY LAW

- § 3:9 Right of publicity—Plaintiff must be "identifiable" from the accused use
- § 3:10 —The requirement of "identification"
- § 3:11 —Authors' Comment on "aided" versus "unaided" identification
- § 3:12 —Identification of plaintiff by how many people?
- § 3:13 —Authors' comment: The problem of identifiability for non-celebrity plaintiffs

### III. INTENT TO INFRINGE ONE'S RIGHT OF PUBLICITY

- § 3:14 Intent to infringe plaintiff's right of publicity
- § 3:15 Mistake as to consent from plaintiff
- § 3:16 The Constitutional requirement of "actual malice" in defamation cases does not apply to the right of publicity

#### IV. LIABILITY OF DISTRIBUTORS

- § 3:17 Liability of those who only circulate another's infringement—Is knowledge required?
- § 3:18 Liability of those who only distribute or advertise another's infringement—Privacy and publicity law

### V. LIABILITY OF INTERNET SERVICE PROVIDERS

§ 3:19 Liability of internet service providers: the 1996 Communications Decency Act safe harbor

### VI. CONTRIBUTORY INFRINGEMENT OF THE RIGHT OF PUBLICITY

§ 3:20 Contributory infringement of the right of publicity and liability of corporate officers and directors

# CHAPTER 4. WHO AND WHAT ARE PROTECTED BY THE RIGHT OF PUBLICITY

#### I. WHO HAS A RIGHT OF PUBLICITY?

### A. CELEBRITY STATUS

- § 4:1 Celebrities
- § 4:2 —Who is a "celebrity"?
- § 4:3 —Authors' comment: don't draw a line between "celebrities" and "noncelebrities"
- § 4:4 Is prior exploitation required for living plaintiffs?
- § 4:5 Erroneous use of a prior exploitation requirement for living plaintiffs

TABLE OF	CONTENTS
§ 4:6	Erroneous use of a prior exploitation requirement for living plaintiffs: the <i>Lerman</i> case as an example
§ 4:7	Prior exploitation is not a requirement for living plaintiffs
§ <b>4</b> :8	Why are celebrities' identities used to attract attention to products and advertisements?
§ 4:9	Celebrities' right to recover for invasion of privacy
§ 4:10	—Can a celebrity's feelings be hurt by advertising?
§ 4:11 /I	Reserved]
§ 4:12	Celebrities' right to recover for invasion of privacy—Professional models
§ 4:13	—Special cases of embarrassing infringement
В.	THE RIGHT OF PUBLICITY PROTECTS THE IDENTITY OF NON-CELEBRITIES
§ 4:14	Noncelebrities
§ 4:15	—Minority view: noncelebrities have no right of publicity
§ 4:16	—Majority view: noncelebrities have a right of publicity
§ 4:17	—Defendant's commercial use proves the commercial value of a non-celebrity's identity
§ 4:18	—Authors' comment: noncelebrities should not be locked into the mental distress mold
§ 4:19	—Commentators support the majority view
§ 4:20	—Authors' comment: everyone has a right of publicity
§ 4:21	—Members of the Armed Services
§ 4:22	Joinder of privacy and publicity claims
C.	THE RIGHT OF PUBLICITY AND POLITICAL PERSONS

 $\S 4:23$ The right of publicity of persons involved in the political process § 4:24 Political figures—Privacy and publicity rights of political figures —Context of use is critical § 4:25 —Drawing the line between politically § 4:26 informative use and advertising use § 4:27 —Political expression by the user of items embodying the identity of a political figure

§ 4:28	[Reserved]
§ 4:29	Political figures—Political status as a joke: the <i>Pat Paulsen</i> case
§ 4:30	—Use and misuse of identity in the political process
§ 4:31	Deceased political figures
§ 4:32	—Commercial uses "in memory of" deceased political figures: the <i>Martin Luther King</i> , <i>Jr</i> . case
§ 4:33	—Preventing undignified uses of deceased public figures
§ 4:34	<ul> <li>Naming public facilities after a deceased political figure</li> </ul>
§ 4:35	—Authors' comment
Ι	D. THE RIGHT OF PUBLICITY OF NON- HUMAN PERSONS: LITERARY AND CARTOON CHARACTERS AND ANIMALS
§ 4:36	Do literary and illustrated characters have a right of publicity?
$\S~4:37$	Do animals and pets have a right of publicity?
§ 4:38	Authors' Comment: animals should not have a right of publicity
E	C. THE RIGHTS OF PUBLICITY AND PRIVACY OF ORGANIZATIONS, GROUPS AND CORPORATIONS
§ 4:39	Nonhuman "persons": corporations, groups, and institutions
§ 4:40	—Case law and statutory law
§ 4:41	Nonhuman "persons"—There is no right of publicity for corporations and associations
$\S~4{:}42$	A right of publicity for musical groups?
§ 4:43	A right of privacy for associations—Case law and statutory law
§ 4:44	Nonhuman "persons": corporations, groups, and institutions—Overwhelming the law of trademarks and unfair competition

Authors' comment: there should not be a right of publicity for the identity of non-human "persons"

§ 4:45

### II. WHAT DOES THE RIGHT OF PUBLICITY PROTECT?

§ 4:46 "Persona"

### A. PERSONAL NAMES

11.	
§ 4:47	Personal names
§ 4:48	—Identification of plaintiff by name
§ 4:49	—Name-sameness alone
§ 4:50	—Names with a nonname meaning also and names that are generic for a product
§ 4:51	—Context in which a name appears
§ 4:52	—Here's Johnny: a name as identifying plaintiff's
	persona
§ 4:53	—Use of variations of a name to avoid identification
§ 4:54	Impersonations, identity theft, and forgery
$\S 4:55$	Personal names—Name with another's picture
§ 4:56	Nicknames, stage names, and pen names
§ 4:57	—Common-law rights
§ 4:58	—Statutory rights
ъ	IMACEC OF DEODI E

### B. IMAGES OF PEOPLE

§ 4:59	Pictures
§ 4:60	—Infringement of right of publicity by use of picture of a person
§ 4:61	—Test of identifiability by picture
§ 4:62	—Identifiable by distinctive body movement or
	posture
§ 4:63	—Celebrity look-alikes in advertising
§ 4:64	—Plaintiff's picture with another's name
§ 4:65	—Faces in the crowd
§ 4:66	— — Media filming of public events
§ 4:67	——Group scenes in commercial advertisement

### C. PERSONA IN A ROLE OR CHARACTERIZATION

§ 4:68	Persona in a role or characterization
§ 4:69	—Persona embodied in an actor's characterization
§ 4:70	—Playing a role as opposed to being the character
§ 4:71	—Case of Bela Lugosi as Count Dracula

- \$ 4:72 —"Inextricably identified" test: the Spanky McFarland case
- § 4:73 —Authors' comment

### D. PERSONAL VOICE AND SOUND

- § 4:74 Voice and sound
- § 4:75 —Distinctive "sound": style of instrumental playing
- § 4:76 —Voice sound-alikes
- § 4:77 ——Early cases
- $\S 4:78$  ——Modern cases
- § 4:79 —Authors' comment
- § 4:80 —Federal preemption issues
- § 4:81 ——Is a copyright licensee free from liability for state law violations?
- § 4:82 [Reserved]
- § 4:83 Voice and sound—Federal preemption issues— Copyright preemption of right of publicity claims based on sound?

#### E. OBJECTS ASSOCIATED WITH A PERSON

- § 4:84 Persona identified by objects associated with a person
- § 4:85 —Motschenbacher case
- § 4:86 —Objects which identify plaintiff's persona
- § 4:87 —Vanna White case
- § 4:88 —Authors' comment

# CHAPTER 5. NON-PUBLICITY THEORIES USED TO PROTECT PERSONA AND THE COMMON LAW RIGHT OF PRIVACY

#### I. OVERVIEW

- § 5:1 Introduction: the menu of legal rights
- § 5:2 —Using legal categories as a checklist
- § 5:3 —Authors' comment: the significance of legal labels
- § 5:4 —Overview of the legal neighborhood

### II. TRADEMARKS AND FALSE ADVERTISING

### A. TRADEMARKS AND SERVICE MARKS

§ 5:5	Trademarks and service marks
§ 5:6	—Right of publicity and trademarks: similar but different
§ 5:7	—Chart of significant differences between trademarks and the right of publicity
§ 5:8	—Differences
§ 5:9	— —What is identified
§ 5:10	— —Prior exploitation
§ 5:11	— —Test of infringement
§ 5:12	— —Transfer rules
§ 5:13	Service marks in personal and entertainment services
§ 5:14	Service mark or trademark rights in a person's
	name, nickname or picture
§ 5:15	[Reserved]
§ 5:16	[Reserved]
8 5.17	Service marks in personal and entertainment

### B. FALSE ADVERTISING

services—Authors' comment

- § 5:18 Falsity based claims: false advertising and false endorsement
- § 5:19 Right of publicity infringement requires no proof of falsity or showing of false endorsement
- § 5:20 False endorsement and false advertising under Lanham Act § 43(a)
- § 5:21 —Proof of falsity
- § 5:22 False advertising and false endorsement under Lanham Act § 43(a)—Standing to sue
- § 5:23 False advertising under Lanham Act § 43(a)— Materiality
- § 5:24 False advertising—Use of § 43(a) in literary and entertainment advertising
- $\S~5{:}25~$  —The 2003 Supreme Court decision in Dastar
- § 5:26 [Reserved]
- § 5:27 False use of a creator or performer's name in an expressive work
- § 5:28 [Reserved]
- $\S 5:29 [Reserved]$
- § 5:30 Protection of media marks

### C. FALSE ENDORSEMENT

8	5:31	False	endorsement	under	Lanham Ac	t. 8	430	้ล
- 53	0.01	1 aisc	CHAOL SCHICH	unuci	Lamiam M	υx	TU	

- § 5:32 False endorsement by a deceased person?
- § 5:33 False endorsement by a non-celebrity?
- § 5:34 False advertising—Illustrative list of falseendorsement cases—Cases finding false endorsement
- § 5:35 ——Cases finding no false endorsement
- § 5:36 —Federal Trade Commission: deceptive endorsements and testimonials
- § 5:37 —Endorser tort liability

#### III. COPYRIGHT AND MISAPPROPRIATION

#### A. COPYRIGHT

- § 5:38 Copyright
- § 5:39 —Outline of copyright law
- § 5:40 —Copyright compared to the personal identification aspect of the right of publicity
- § 5:41 Copyright does not protect the human persona which is the subject of the state law right of publicity
- § 5:42 Copyright does not protect the identification function of the names of persons
- § 5:43 Copyright does not protect the identification function of images of persons
- § 5:44 Copyright does not protect the identification function of sounds
- § 5:45 Copyright compared to the personal identification aspect of the state law right of publicity—
  Authors' comment
- § 5:46 Copyright compared to performance values protected by the state law right of publicity

### B. THE COMMON LAW TORT OF MISAPPROPRIATION

- § 5:47 The INS v AP tort of misappropriation
- § 5:48 Misappropriation—Misappropriation doctrine and the right of publicity
- § 5:49 —Outline of the misappropriation doctrine
- § 5:50 ——Misappropriation as a residual commercial tort

§ 5:51	[Reserved]
§ 5:52	Misappropriation—Outline of the
	misappropriation doctrine—Preemption
	problems with misappropriation
§ 5:53	——Authors' comment
IV.	RIGHTS OF PRIVACY
A	A. CONSTITUTIONAL PRIVACY
§ 5:54	Constitutional "privacy" rights
§ 5:55	—Introduction to constitutional privacy
§ 5:56	—Constitutional privacy is different from tort law privacy
§ 5:57	—Outline of constitutional privacy
§ 5:58	—Governmental collection and disclosure of confidential information
§ 5:59	—Authors' conclusion on constitutional privacy
Ε	B. APPROPRIATION PRIVACY
§ 5:60	Appropriation form of privacy
§ 5:61	—Invasion of privacy by appropriation
§ 5:62	—Elements of a claim for invasion of privacy by appropriation of name or likeness
§ 5:63	<ul> <li>Appropriation privacy compared to the right of publicity</li> </ul>
§ 5:64	—Chart of comparison between "appropriation privacy" and the "right of publicity"
§ 5:65	—Cases distinguishing privacy from publicity
§ 5:66	—Commentary distinguishing privacy from publicity
§ 5:67	—Authors' comment: personal right of privacy versus property right of publicity
C	C. DISCLOSURE PRIVACY
§ 5:68	Disclosure of private facts form of privacy
§ 5:69	—Elements of the tort of invasion of privacy by
5	disclosure
§ 5:70	—Disclosure from Data Breaches or Otherwise
§ 5:71	—Disclosure must be highly offensive
§ 5:72	—Persons formerly in the news
§ 5:73	—Disclosing the identity of donors of AIDS- infected blood and of AIDS-infected persons
	interior production of the mileton persons

§ 5:74	—Critics of, and States not recognizing, the tort
§ 5:75	—Suing under a fictitious name
§ 5:76	—Disclosure privacy rights and the First
	Amendment
§ 5:77	——Facts of legitimate concern to the public
§ 5:78	<ul> <li>— Identifying individuals and naming names</li> </ul>
§ 5:79	—Facts in the public record
§ 5:80	—Publishing the accusation of a crime
§ 5:81	—Factors to weigh in balancing free speech
§ 5:82	[Reserved]
§ 5:83	Disclosure of private facts form of privacy—
	Privacy and government records: the Freedom of
	Information Act and the Privacy Act
§ 5:84	——Freedom of Information Act
§ 5:85	— — Privacy Act
§ 5:86	— —Other federal privacy laws
D	. INTRUSION PRIVACY
§ 5:87	Intrusion form of privacy
§ 5:88	—Importance of protection from intrusion
§ 5:89	—Defining intrusion
§ 5:90	—Intrusion by the media cooperating with police
3 0.00	and fire departments and other governmental
e = 01	agencies
§ 5:91	—Intrusion by viewing persons in private places
§ 5:92	—Intrusion by tampering with mail,
	wiretapping, interception of online activities, or
8 5.00	collecting and retaining biometric information
§ 5:93	—Reasonable expectation of privacy
§ 5:94	—Intrusion on employee privacy
§ 5:95	—What is a "highly offensive" intrusion?
§ 5:96	—Hidden cameras, pretexting and obtaining
6 5 07	consent by misrepresentation
§ 5:97	—Activities in public places
§ 5:98	—Relative privacy
§ 5:99	—Freedom from harassment
§ 5:100	1 0
§ 5:101	8 8
§ 5:102	—Intrusion by inducing breach of trust or fiduciary duty
8 5.100	· ·
§ 5:103	the intrusion tort
8 5.104	[Reserved]
8 0.104	(Treserveu)

§ 5:105 [Reserved]

### E. OTHER ASPECTS OF PRIVACY

§ 5:106 RICO claims

### V. DEFAMATION AND FALSE LIGHT INVASION OF PRIVACY

§ 5:107	Defamation law
§ 5:108	—Authors' introduction
§ 5:109	—Elements of a legal claim for defamation
§ 5:110	—Libel by false testimonial or endorsement
	[Reserved]
§ 5:112	False light invasion of privacy
§ 5:113	—History and development of the tort
§ 5:114	Elements of a claim for invasion of false light
5 0.111	privacy
§ 5:115	—Jurisdictions rejecting the false light tort
§ 5:116	—Relationship between invasion of false light
Ü	privacy and defamation
§ 5:117	——Is it reputation or dignity that is protected?
§ 5:118	—Relationship between false light and
Ü	defamation—Falsehoods that do not harm
	reputation can be actionable under false light
	tort
§ 5:119	Evidentiary and procedural issues in false light
	cases—The Hearsay Rule and Motions to Seal
§ 5:120	False light invasion of privacy—The falsity and
	offensiveness requirements
§ 5:121	—Proving indignity from false light—Forum of
	publication causing false light and indignity
§ 5:122	<ul> <li>— Fictionalized interviews and dialogue</li> </ul>
§ 5:123	—Requirement of "malice"
§ 5:124	—Illustrative list of significant false light
	privacy cases
§ 5:125	—False light privacy distinguished from the
	right of publicity

### VI. OTHER RELATED TORTS

§ 5:126	Infliction of mental distress
§ 5:127	—Intentional infliction of mental distress
§ 5:128	—Negligent infliction of mental distress
§ 5:129	—Media attacks on public figures

- $\ 5:130\ --$  Outrageous commercial uses of personal identity
- § 5:131 Prima facie tort

### CHAPTER 6. LEGAL SOURCES DEFINING THE RIGHTS OF PUBLICITY AND PRIVACY

### I. STATE COMMON LAW

- § 6:1 Introduction to the law of the states—Right of privacy
- § 6:2 —Right of publicity
- § 6:3 —Flexibility of the common law

#### II. STATE STATUTES

### A. OVERVIEW

- § 6:4 Survey of state statutes—Overview of the right of publicity statutes
- § 6:5 —Overview of the state statutes
- § 6:6 Chart of state statutes: appropriation privacy and right of publicity
- § 6:7 Chart of the types of privacy codified

### B. STATES WITH STATUTES

- § 6:8 Alabama
- § 6:9 Text of the Alabama Statute
- § 6:10 Arizona
- § 6:11 Text of the Arizona Statutes
- § 6:12 Arkansas
- § 6:13 Text of the Arkansas Statute
- § 6:14 California
- § 6:15 —Authors' introduction to California law
- § 6:16 Statute of limitations—California right of privacy
- § 6:17 California—Acceptance of the common law rights of privacy
- § 6:18 —The "four torts" of privacy
- § 6:19 —Invasion of privacy by intrusion
- § 6:20 —Invasion of privacy by offensive disclosure of private facts

§ 6:21	—Invasion of privacy by false light
§ 6:22	—California "anti-paparazzi" intrusion statute
§ 6:23	—California constitutional right of privacy
§ 6:24	—California common law of invasion of privacy
_	by commercial appropriation
§ 6:25	—California common law right of publicity
§ 6:26	—1972 and 1985 California statutes
§ 6:27	— —1972 California statute
§ 6:28	——1985 California statutes: life and after-life
§ 6:29	—1999, 2007 and 2010 Amendments to the
	postmortem statute
§ 6:30	—Anti-SLAPP motion to dismiss
§ 6:31	—Statute of limitations
§ 6:32	—California statutes: analysis and
	commentary—Rights protected—Rights of
	"persons"
§ 6:33	———Protected aspects of personal identity ——Face in the crowd
§ 6:34	———Face in the crowd
§ 6:35	——Prohibited uses
§ 6:36	——Exempted uses
§ 6:37	———Exemptions for living and deceased
	persons
§ 6:38	———Exemptions for use of identity of
	deceased persons prior to 1999 amendments
§ 6:39	——Exemptions for use of identity of deceased
	persons after the 1999 amendments
§ 6:40	— —Transferability
§ 6:41	——Consent and license
§ 6:42	——Postmortem rights
§ 6:43	— — Legislative change of the <i>Lugosi</i> rule
§ 6:44	——Registration of claim
§ 6:45	— — Who owns the postmortem right?
§ 6:46	———Devises of the post mortem right
	publicity by persons who died prior to 1985
§ 6:47	— — —Statutory definition of "survivors"
§ 6:48	— — — Illustrative example
§ 6:49	— — Differences from copyright law
§ 6:50	——Remedies
§ 6:51	——Impact on common law rights
§ 6:52	— —Knowledge and intent
§ 6:53	—Text of the California statutes: postmortem
	statute as amended
§ 6:54	—Text of the California statutes: 1985 statute
	for living persons

§ 6:55	Florida			
§ 6:56	Overview of Florida constitutional and common Law Privacy Rights			
§ 6:57	Overview of Florida Statutory Privacy and Publicity Rights			
§ 6:58	Florida—Text of the Florida statutes			
§ 6:59	Hawaii			
§ 6:60	Text of the Hawaii Statute			
§ 6:61	Illinois—Overview of the Illinois statute			
§ 6:62	—Text of the Illinois statute			
§ 6:63	Indiana			
§ 6:64	—Overview of the Indiana statute			
§ 6:65	—Text of the Indiana statute			
§ 6:66	Kentucky			
§ 6:67	—Overview of the Kentucky statute			
§ 6:68	—Text of the Kentucky statute			
§ 6:69	Louisiana			
§ 6:70	—Overview of the Louisiana statute			
§ 6:71	—Text of the Louisiana statute			
§ 6:72	Massachusetts			
§ 6:73 —Overview of Massachusetts Common Law an				
	Privacy-Publicity Statutes			
§ 6:74	—Text of the Massachusetts statutes			
§ 6:75	Nebraska			
§ 6:76	—Research references			
§ 6:77	—Text of the Nebraska statutes			
§ 6:78	Nevada			
§ 6:79	—Overview of the Nevada statute			
§ 6:80	—Text of the Nevada statute			
§ 6:81	New Jersey			
§ 6:82	New York			
§ 6:83	—Authors' introduction to New York law			
§ 6:84	—Short history of the New York privacy statute			
§ 6:85	5 —Statutory and common law privacy and publicity rights			
§ 6:86	—Rights of privacy in New York—Intrusion form of privacy			
§ 6:87	——Disclosure of private facts form of privacy			
§ 6:88	——2003 Surreptitious Surveillance Law			
§ 6:89	— —False light invasion of privacy			
§ 6:90	Right of publicity in New York			
§ 6:91	—New York General Business Law § 397			
§ 6:92	—Analysis of the New York statute			
5 0.02	Time you of the free for the bull bull bull bull bull bull bull bul			

```
§ 6:93
         — Rights protected
§ 6:94
         — Prohibited uses
§ 6:95
         — — —Advertising purposes and purposes of
          trade
§ 6:96
         — — Newsworthiness exception
         — — Reasonable relationship requirement
§ 6:97
§ 6:98
         ———Newsworthy material in a commercial
          medium
§ 6:99
         — — —Incidental use exception
§ 6:100
         ———Noncommercial uses
         — — —Artistic uses
§ 6:101
§ 6:102
         — —Exempted uses
         — —Transferability
§ 6:103
§ 6:104
         ——Consent and license
         ——Postmortem uses
§ 6:105
§ 6:106
         -- Remedies and statute of limitations
§ 6:107
         ——Impact on common law rights
§ 6:108
         --- Knowledge and intent
§ 6:109
         —Text of the New York statutes
         ——Civil Rights Law §§ 50, 50-f, 51 and 52-C
§ 6:110
         ——N.Y. Gen. Bus. Law § 397
§ 6:111
§ 6:112
         Ohio
         -Overview of the Ohio statute
§ 6:113
         —Text of the Ohio statute
§ 6:114
§ 6:115
         Oklahoma
         —Research references
§ 6:116
§ 6:117
         —Text of the Oklahoma statute
§ 6:118
         Pennsylvania
         —Overview of the Pennsylvania statute
§ 6:119
§ 6:120
         —Text of the Pennsylvania statute
§ 6:121
         Rhode Island
§ 6:122
         —Text of the Rhode Island statute
§ 6:123
         South Dakota
§ 6:124
         Text of the South Dakota Statute
§ 6:125 [Reserved]
§ 6:126
         Tennessee
         —Text of the Tennessee statute
§ 6:127
§ 6:128
         Texas
         -Common law
§ 6:129
§ 6:130
         —Texas statute
         —Text of the Texas statute
§ 6:131
         Utah
§ 6:132
§ 6:133
         —Research references
```

§	6:134	—Text of the Utah statute			
§	6:135				
§	6:136	—Analysis of the Statute			
§	6:137	—Text of the Virginia statutes			
§	6:138	Washington common law of privacy			
§	6:139	Washington—Overview of the Washington statute			
§	6:140	—Text of the Washington statute			
§	6:141	Wisconsin			
§	6:142	—Overview of Wisconsin law			
§	6:143	—Text of the Wisconsin statute			
I	II. I	FEDERAL LAW			
Ş	6:144	Federal law: introduction			
_	6:145				
§	6:146	—Lanham Act § 43(a) is not a vehicle for asser-			
		tion of infringement of the right of publicity			
§	6:147	Federal law—Federal court jurisdiction over			
		right of publicity claim			
§	6:148	Using personal identity to prevent federal			
0	0.1.10	trademark and service mark registration			
-	6:149	—Lanham Act § 2(a)			
-		[Reserved]			
§	6:151	Using personal identity to prevent federal trademark and service mark registration— Lanham Act § 2(c)—Section 2(c) as a vehicle for publicity and privacy rights			
§	6:152	— —Identification under § 2(c)			
§	6:153	[Reserved]			
§	6:154	Using personal name or image as a trademark or service mark			
§	6:155	—Registered and unregistered rights			
§	6:156	Federal Trade Commission endorsement guides—Introduction			
§	6:157	—Celebrities			
§	6:158	[Reserved]			
Γ	V. I	FOREIGN LAW			
§	6:159	Foreign Laws on Publicity and Privacy			
	6:160	European Convention on Human Rights			
	6:161	England: Right of privacy			
-	\$ 6:162 England: Right of publicity				
9					

xxxiv

§	6:163	Australia		
§	6:164	—Protecting goodwill and reputation		
§	6:165	—Privacy and protecting confidential		
		information		
§	6:166	Canada		
§	6:167	[Reserved]		
§	6:168	[Reserved]		
§	6:169	German Law		
§	6:170	Germany—Right to one's picture		
§	6:171	—Right to one's name		
§	6:172	—General personality right		
§	6:173	—Afterlife protection of a persona		
§	6:174	—Protection of minors		
§	6:175	—Consequences of an infringement of a		
		personality right		
§	6:176	—Licensing		
§	6:177	—Author's rights		
§	6:178	—Commentary and statutes		

### Volume 2

# CHAPTER 7. INFRINGING USE OF PERSONAL IDENTITY IN A COMMERCIAL SETTING

### I. USE IN ADVERTISING

### A. FREE SPEECH, COMMERCIAL SPEECH AND USE OF IDENTITY IN ADVERTISING

- § 7:1 Do commercial uses have First Amendment immunity?
- § 7:2 "Commercial" speech distinguished from "expressive" speech
- § 7:3 Will free speech principles immunize commercial use of identity from liability for right of publicity infringement?
- § 7:4 [Reserved]
- § 7:5 Free speech principles and use of names in litigation
- § 7:6 Use and misuse of identity in deposition video
- § 7:7 Use of personal name in domain name

#### § 7:8 [Reserved]

### B. LOOK-ALIKES AND SOUND-ALIKES IN ADVERTISING

- § 7:9 Celebrity look-alikes and sound-alikes in advertising
- § 7:10 —Celebrity look-alikes
- § 7:11 —Celebrity sound-alikes

### C. CREATOR'S NAMES USED IN CONNECTION WITH THEIR CREATIONS

§ 7:12 Names of authors, artists, and performers in connection with their works

### D. NEWS ITEM USED IN AN ADVERTISEMENT

- § 7:13 Reprinting a news feature as an advertisement
- § 7:14 —Reprinting news items in an advertisement for nonmedia goods and services

## E. NEWS ITEM USED AS AN ADVERTISEMENT FOR A MEDIA PUBLICATION

- § 7:15 Reprinting a news feature as an advertisement— Incidental use: reprinting media feature as an advertisement for the media
- § 7:16 ——New York media advertising immunity
- § 7:17 ——Media advertising exception in other states
- § 7:18 ——Authors' comment

### F. AN ADVERTISEMENT BECOMES NEWS

§ 7:19 Reprinting a news feature as an advertisement— Reproducing an advertisement as news

### G. INCIDENTAL AND INSIGNIFICANT USAGE OF IDENTITY

§ 7:20 Insignificant or fleeting usage

xxxvi

#### II. USE ON PRODUCTS

### A. FREE SPEECH AND USE OF IDENTITY ON PRODUCTS

- § 7:21 Does celebrity memorabilia have First Amendment value as free speech?
- § 7:22 —Focusing on the medium rather than the message
- § 7:23 [Reserved]
- § 7:24 Classifying specific products as commercial merchandise or expressive media

### B. EXAMPLES OF USE ON SPECIFIC PRODUCTS

- § 7:25 Specific products—T-shirts and wearing apparel
- § 7:26 —Board games and video games
- § 7:27 —Internet fantasy sports
- § 7:28 —Posters
- § 7:29 —Calendars
- § 7:30 —Background reports, dossiers and subscription lists

### C. USE OF IDENTITY ON REPACKAGED OR USED GENUINE GOODS

§ 7:31 Specific products—Repackaged or used genuine merchandise

#### III. USE IN CYBERSPACE

- § 7:32 Federal Anti-cybersquatting Act: person's names
- § 7:33 State anti-cybersquatting acts
- § 7:34 Use of name or image on web sites

### CHAPTER 8. INFRINGING USE OF PERSONAL IDENTITY IN EXPRESSIVE WORKS

#### I. FIRST AMENDMENT

#### A. OVERVIEW

§ 8:1 The purpose of the First Amendment and its commitment to free speech

§	8:2 [Re	eserved]		
	8:3			
§	8:4	Entertainment speech		
8	8:5	False commercial speech		
§	8:6	A Constitutional right not to listen and not to speak		
§	8:7	The "self-fulfillment" purpose of the First Amendment		
§	8:8	The "safety valve" purpose of the First Amendment		
§	8:9	Free speech, "breathing space" and the "chilling effect"		
§	Authors' comment: "Free speech" can permit the media to make free commercial use of the identity of prominent people			
§	8:11	The least restrictive alternative rule		
§	8:12 Hierarchy of First Amendment protection			
§	8:13	—Introduction to the different levels of "speech"		
§	8:14 —"News": information about public issues and the real world			
§	8:15	—"Stories": fiction and entertainment		
§	8:16 —"Advertising": the message is "buy"			
	B. COMMERCIAL SPEECH			
§	8:17	Introduction to "commercial speech"		
§	8:18	The place of "commercial speech" in the hierarchy of the First Amendment		
§	8:19 Distinguishing commercial speech from non- commercial speech			
§	8:20	The <i>Central Hudson</i> four part test of commercial speech		
§	8 8:21 Where is the "governmental action" in private litigation?			

### II. PUBLICITY AND PRIVACY RIGHTS AND THE FIRST AMENDMENT

### A. FREE SPEECH IN THE CONTEXT OF THE RIGHT OF PUBLICITY

- § 8:22 Balancing the free speech defense against the right of publicity
- § 8:23 The free speech defense to the right of publicity— Methods for balancing the two legal rights

xxxviii

§	8:24	Balancing the right of publicity against the First Amendment—Balancing the right of publicity against free speech: the <i>Zacchini</i> case
8	8:25	——Majority opinion
	8:26	——Dissent
-	8:27	— — What are the lessons of <i>Zacchini?</i>
	8:28	Property rights and free speech
	8:29	—Weighing the property right in the right of publicity against First Amendment rights
§	8:30	— —Trademark analogy
	8:31	——Shopping center analogy
§	8:32	——Authors' comment: drawing the analogy to the right of publicity
§	8:33	—Is there a constitutional right not to be forced to permit the property in one's identity to be used as a vehicle for defendant's message?
§	8:34	Can the First Amendment be directly incorporated into the right of publicity?
Ş	8:35	[Reserved]
	8:36	Can the First Amendment be directly incorporated into the right of publicity?— Narrowly construing a privacy or publicity statute
§	8:37	[Reserved]
§	8:38	Can the First Amendment be directly incorporated into the right of publicity?— Borrowing the copyright "fair use" defense
§	8:39	[Reserved]

### B. FREE SPEECH IN THE CONTEXT OF THE RIGHT OF PRIVACY

§ 8:40 Rights of privacy and the First Amendment
 § 8:41 —Introduction
 § 8:42 —Intrusion form of invasion of privacy
 § 8:43 —Disclosure of private facts form of invasion of privacy
 § 8:44 —False light invasion of privacy
 § 8:45 —Appropriation form of invasion of privacy

### III. EXPRESSIVE USES OF PERSONAL IDENTITY

### A. USE OF IDENTITY IN CONNECTION WITH NEWSWORTHY STORIES

§ 8:46 Personal identity used in connection with "news"

§	8:47	News reportage and commentary on public issues
§	8:48	[Reserved]
§	8:49	[Reserved]
§	8:50	[Reserved]
§	8:51	News reportage and commentary on public issues—Matters of public concern
§	8:52	—Illustrative list of items held newsworthy
§	8:53	—Educational and scholarly uses of identity
§	8:54	—Press conferences and interviews
§	8:55	—Doings of celebrities as protected news
§	8:56	—Constitutional value of news about people
§	8:57	—Reasonable relationship between the person and the news
§	8:58	<ul> <li>— Liability for invasion of "appropriation" or "disclosure" privacy or infringement of the right of publicity</li> </ul>
§	8:59	Unnecessary insertion of personal identity into news or entertainment
§	8:60	Private persons involved in newsworthy events
Ş	8:61	[Reserved]
§	8:62	Examples of unnecessarily identifying persons in the news
§	8:63	News reportage and commentary on public issues—Putting person in a false light by photograph illustrating a controversial issue
	Ε	B. LIFE STORIES
§	8:64	Life Story Rights? Authors' comment
§	8:65	Telling the story—Liability to the subject of the story
§	8:66	—Liability to relatives and associates of the subject of the story
	(	C. MEDIA PROFIT

Media profit and advertising do not remove First Amendment protection—Supreme Court § 8:67 precedentFirst Amendment protection applies to publishing or selling news or expressive works for profit § 8:68 Advertising for constitutionally protected uses § 8:69 § 8:70 Corporate funded documentaries

### D. METHODS FOR BALANCING THE FREE SPEECH DEFENSE

- § 8:71 Use in expressive works—The *Rogers* balancing test for falsity-based claims
- § 8:72 Artistic and expressive uses and the "Transformative Test"
- § 8:73 Video games and the transformative use test

### E. FICTION AND DOCUDRAMA

- § 8:74 Fiction, faction, and docudrama—Introduction
- § 8:75 [Reserved]
- § 8:76 Fiction, faction, and docudrama—New York fictionalization cases
- § 8:77 Authors' opinion on the New York Fictionalization Rule
- § 8:78 Fictionalization cases in other states
- § 8:79 —California: the *Rudolph Valentino* case analysis
- § 8:80 —Texas and other states: the *Matthews* case and its progeny
- § 8:81 Commentators' viewpoints
- § 8:82 Authors' comment: what is a common sense constitutional rule for fiction, faction, and docudrama?
- § 8:83 Disclaimer of factual treatment and disclosure of fiction

#### F. FICTION AND FACT

- § 8:84 What is the significance of falsity?
- § 8:85 —Authors' introductory comment: defining the issue
- § 8:86 —Case law
- § 8:87 ——New York cases
- § 8:88 ——California cases
- § 8:89 —Authors' comment: the impact of falsity

### G. MIXED COMMERCIAL AND EXPRESSIVE USES

- § 8:90 Line between news, fiction, and advertising
- § 8:91 —News versus advertising: political and public issue speech versus commercial speech
- § 8:92 [Reserved]

§ 8:93	commercial or expressive?				
§ 8:94 Parody as a defense					
§ 8:95	§ 8:95 Conveying information in a predominantly commercial setting				
§ 8:96 [I	Reserved]				
§ 8:97	Mixed commercial and communicative messages				
§ 8:98	Commercial and communicative messages inextricably intertwined				
§ 8:99	Characterizing mixed media messages				
Н.	ADVERTISEMENT IN DISGUISE				
§ 8:100	Advertisement in disguise				
§ 8:101	—New York concept of an "advertisement in disguise"				
§ 8:102	—Authors' comment: what is the newsworthy content of the news?				
IV. P	ERFORMANCE RIGHTS AND THE MEDIA				
A.	REPRODUCTION OF A PERFORMANCE				
§ 8:103	Reproduction of performance				
§ 8:104					
§ 8:105	—State common law copyright				
§ 8:106	—Performance reproduction as misappropriation				
§ 8:107 —1994 Federal Anti-Bootlegging Act					
§ 8:108	Imitation of performance: Authors' comment—				
\$ 0.100	the right of publicity is not appropriate				
В.	IMITATION OF STYLE				
§ 8:109	Imitation of style: advertising use				
§ 8:110 —Performing "style" and the right of publicity					
§ 8:111 —Infringement by imitation in advertising					
§ 8:112 Imitation of style: entertainment use by mimics					
3 0.111	and impersonators				
§ 8:113	—Use in competitive entertainment				
§ 8:114	—Parody of persons in comedic entertainment				
§ 8:115	Imitation of style: mimics and impersonators of				
3 0.110	deceased performers				
§ 8:116	—Advertising uses of imitations of deceased				
	performers				

§ 8:117	—Entertainment uses of imitations of decease	
	performers	
§ 8:118	——Elvis Presley performance case	
§ 8:119	——Marx Brothers case	
§ 8:120	— Janis Joplin case	
§ 8:121	——Copyright fair use defense for	
	entertainment parody	
§ 8:122	——Authors' comment: theatrical imitations of	
	deceased performers	
§ 8:123	Computer animations and simulations of actors	

### CHAPTER 9. POSTMORTEM RIGHT OF PUBLICITY

### I. PRIVACY RIGHTS—NO POST MORTEM DURATION

§ 9:1 Privacy rights: no postmortem duration

### II. POST MORTEM DURATION OF THE RIGHT OF PUBLICITY

### A. ARGUMENTS PRO AND CON FOR A POST MORTEM DURATION

§ 9:2 Postmortem right of publicity: the arguments pro and con § 9:3 —Authors' introduction to the issue § 9:4 -Arguments for and against the postmortem right of publicity --- "Property" versus "personal" rights debate § 9:5 --- Argument over analogies § 9:6 § 9:7 — Policy debate — — Policy arguments against a postmortem § 9:8 right of publicity ———Policy arguments in favor of a postmortem § 9:9 right of publicity —Authors' comment: misusing the postmortem § 9:10 right of publicity to assert dignitary interests

### B. THE ARCHAIC RULE—LIFETIME EXPLOITATION REQUIRED

§ 9:11 Is lifetime exploitation required?

- § 9:12 —Introduction
- § 9:13 —History of the "lifetime exploitation" condition on postmortem rights
- § 9:14 ——Authors' comment: why the exploitation requirement?
- § 9:15 ——Rejection of the lifetime exploitation requirement

### C. HOW LONG SHOULD THE POST MORTEM DURATION LAST?

§ 9:16 How long should the right of publicity last?

### D. SURVEY OF THE STATES—POST MORTEM RIGHTS

- § 9:17 State of the law on a post mortem right of publicity—A survey of the states
- § 9:18 State of the law on a post mortem right of publicity
- § 9:19 Postmortem rule of the states—Alabama
- § 9:20 —Arizona
- § 9:21 —Arkansas
- § 9:22 —California
- § 9:23 —Connecticut
- § 9:24 —Florida
- § 9:25 —Georgia
- § 9:26 —Hawaii
- § 9:27 —Illinois
- § 9:28 —Indiana
- § 9:29 —Kentucky
- § 9:30 —Michigan
- § 9:31 —Minnesota
- § 9:32 —Missouri
- § 9:33 —Nebraska
- § 9:34 —Nevada
- § 9:35 —New Jersey
- § 9:36 —New York
- § 9:37 —Ohio
- § 9:38 —Oklahoma
- § 9:39 —Pennsylvania
- § 9:40 —South Carolina
- § 9:41 —South Dakota
- § 9:42 —Tennessee

- § 9:43 —Texas
- § 9:44 —Utah
- § 9:45 —Virginia
- § 9:46 —Washington
- § 9:47 —Wisconsin

### CHAPTER 10. ASSIGNMENTS AND LICENSES

### I. TRANSFER OF PUBLICITY AND PRIVACY RIGHTS

### A. TRANSFER OF PRIVACY RIGHTS

- § 10:1 Transfer of privacy rights
- § 10:2 —Privacy rights are personal
- § 10:3 ——General rule
- § 10:4 ——Authors' comment
- § 10:5 —Rule leads to creation of the right of publicity

#### B. TRANSFER OF PUBLICITY RIGHTS

- § 10:6 Right of publicity is property
- § 10:7 —Right of publicity viewed as a "property" right
- § 10:8 —Significance of the "property" label
- § 10:9 —Infringement of the right of publicity as the "tort" of "unfair competition"
- § 10:10 Assignment of the right of publicity— Introduction
- § 10:11 Rules of trademark assignments
- § 10:12 Sale of name prior to acceptance of the right of publicity
- § 10:13 Assignment of the right of publicity
- § 10:14 Authors' comment on assignment of the right of publicity

### II. LICENSES

#### A. TYPES OF LICENSES

- § 10:15 Licenses of the rights of publicity and privacy
- § 10:16 —Assignments, exclusive licenses, and nonexclusive licenses compared
- § 10:17 Assignments compared to licenses
- § 10:18 Nonexclusive licenses

§ 10:19 § 10:20 § 10:21	Publicity licenses compared to trademark licenses	
В.	SCOPE OF ACTIVITIES PERMITTED IN A LICENSE	
\$ 10:22 \$ 10:23 \$ 10:24 \$ 10:25 \$ 10:26 \$ 10:27 \$ 10:28	Scope of licenses  —Conditions and limitations in licenses  —Determining the scope of the license  —Examples of limitations in licenses  — —Duration  — —Context of use  — —Product line	
C.	ORAL AND WRITTEN LICENSES	
§ 10:29 § 10:30	Oral and written licenses and termination —Is a writing required?	
D.	INFORMAL AND IMPLIED LICENSES	
§ 10:31 § 10:32 § 10:33 § 10:34	Gratuitous licenses, termination and estoppel Implied licenses and estoppel —Consent and license implied from conduct —Fame is not an implied license to infringe the right of publicity	
E.	USE BY LICENSEE OUTSIDE THE SCOPE OF THE LICENSE	
§ 10:35 § 10:36 § 10:37	Use outside scope of license  —Use by licensee outside the scope of the license constitutes infringement  —Licensee changes in content or format of identity	
F.	LACK OF CAPACITY TO CONSENT BY MINORS AND OTHERS	
§ 10:38 § 10:39 § 10:40 § 10:41	10:39 —Minors 10:40 —Mentally disabled persons	

G.	CONFLICTING LICENSES AND PAROLE EVIDENCE		
§ 10:42	Conflicting licenses and parole evidence		
H.	LICENSE INVALID BECAUSE OF FRAUD, MISTAKE OR FORGERY		
§ 10:43 § 10:44	License induced by fraud or mistake Forged licenses		
I.	EMPLOYER'S COMMERCIAL USE OF EMPLOYEE'S IDENTITY		
§ 10:45	Employer's use of employee's identity		
§ 10:46	—Use of employee's identity in advertising outside the scope of employment		
§ 10:47	—Use of employee's identity in advertising within scope of employment: in term and post term		
J.	CONTRACTS BY ACTORS AND PERFORMERS		
§ 10:48	Actors' and performers' contracts		
§ 10:49	—Grant of rights clause		
§ 10:50	Grant to producer of merchandising rights		
\$ 10:51 —Scope of the grant of rights \$ 10:52 —Recovery under quantum meruit			
5 10.02	recovery under quantum merure		
K.	LICENSEE'S STANDING TO SUE THIRD PARTIES		
§ 10:53	Licensee's standing to sue third parties		
L.	CRIMINALS' PUBLISHING CONTRACTS AND "SON OF SAM" LAWS		
§ 10:54	Criminal defendants' publication agreements		
§ 10:55	—"Son of Sam" statutes: publication proceeds paid to criminals		
§ 10:56	—Simon & Schuster case and constitutional challenges		
§ 10:57	—Criminal defense attorneys' publishing arrangements with their clients		

### III. CONTRACT CHECKLIST

§ 10:58	Checklist for drafting and negotiating			
	personality licenses			
§ 10:59	—Licensing checklist			
§ 10:60	— — What legal rights are being licensed?			
§ 10:61	———Rights of publicity and privacy			
§ 10:62	———Waiver of other tort claims			
§ 10:63	———Trademarks and service marks			
§ 10:64	— — —Copyrights			
§ 10:65	<ul> <li>—Aspects of identity being licensed</li> </ul>			
§ 10:66	— —Format and context of use			
§ 10:67	— —Territorial scope			
§ 10:68	——Duration of license			
§ 10:69	— — Up-front payments			
§ 10:70	— —Running royalties			
§ 10:71	— — Minimum royalties			
§ 10:72	— Method and time of paying royalties			
§ 10:73	— —Licensor control over quality of licensed			
	products			
§ 10:74	— —Warranty of right to license			
§ 10:75	——Licensee's use of trademark and copyright			
	notices			
§ 10:76	——Termination and rights upon termination			
§ 10:77	— —Licensee's right to assign or sublicense			
§ 10:78	— —Indemnification and insurance			
§ 10:79	Arbitration, forum selection, and choice of			
	law			
§ 10:80	— —Enforcement of rights against infringers			
§ 10:81	— —Boilerplate language			

### IV. MARITAL AND ESTATE PROPERTY

- § 10:82 Right of publicity as marital property
- § 10:83 Right of publicity as an asset in decedent's estate

### V. ASSETS FOR PAYMENT OF DEBTS

§ 10:84 Foreclosing on the right of publicity

### VI. AUTHENTICITY CONTROLS

§ 10:85 Autographed memorabilia authenticity statutes

xlviii

### CHAPTER 11. PROCEDURE, REMEDIES, AND DEFENSES

### I. PROCEDURE

Δ	PERSONAL.	JURISDICTION
<b>^</b> .	1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	

- § 11:1 Personal jurisdiction
- § 11:2 —Privacy and publicity cases
- § 11:3 —Personal jurisdiction through Internet usage

#### B. FEDERAL JURISDICTION AND STANDING

- § 11:4 Federal jurisdiction
- § 11:5 —Diversity jurisdiction
- § 11:6 —Federal question and pendent jurisdiction
- § 11:7 Standing to litigate in federal court

#### C. CONFLICT OF LAWS

- § 11:8 Conflict of laws
- § 11:9 —Authors' introduction: choice of law
- § 11:10 —Defamation and invasion of privacy
- § 11:11 —Right of publicity: international conflict of
- § 11:12 —Right of publicity: domestic conflict of laws
- § 11:13 ——Applying the law of the forum
- § 11:14 ——Applying the law of the place of infringement
- § 11:15 ——Applying the law of the place of plaintiff's domicile
- § 11:16 ——Applying the law of the place of plaintiff's domicile to existence of a post mortem right
- § 11:17 ——The Rule of Depecage
- § 11:18 ——Authors' Comment on applying the law of plaintiff's domicile to determine a post mortem right of publicity
- § 11:19 —Authors' comment on choice of law

#### D. CLASS ACTIONS

§ 11:20 Class actions

### E. THE SINGLE PUBLICATION RULE

§ 11:21 Single publication rule

### F. ABATEMENT OF CLAIMS FOLLOWING DEATH OF DEFENDANT

§ 11:22 Abatement of claims following death of defendant

#### II. REMEDIES

Α	IN.	HIN	CTI	ONS

- § 11:23 Injunctions
- § 11:24 —Injunction against infringement
- § 11:25 —Preliminary injunction
- § 11:26 —Prior restraint rule
- § 11:27 —Territorial scope of injunction

#### B. DAMAGES

- § 11:28 Damages: indignity and mental distress
- § 11:29 —Nature of the injury
- § 11:30 —Measure of damages
- § 11:31 —How much is appropriate?
- § 11:32 Damages: commercial loss
- § 11:33 —Commercial value of identity
- § 11:34 —Recovering the fair market value of identity
- § 11:35 —Damage to professional standing and publicity value
- § 11:36 —Unjust enrichment and infringer's profits
- § 11:37 —Damages for false endorsement
- § 11:38 Punitive and exemplary damages
- § 11:39 Constitutional limits on punitive damages

#### C. ATTORNEY FEES

§ 11:40 Attorney's fees

#### III. DEFENSES

### A. STATUTE OF LIMITATIONS

- § 11:41 Statute of limitations
- § 11:42 —Accrual of cause of action to start statute of limitations running
- § 11:43 —Statute of limitations: length of time
- § 11:44 —Estoppel by laches and abandonment

#### B. ANTITRUST

- § 11:45 Antitrust
  - C. ABUSE OF LITIGATION AND OF CEASE AND DESIST DEMANDS
- § 11:46 Tortious abuse of litigation and of cease and desist demands
  - D. PREEMPTION OF STATE PUBLICITY AND PRIVACY CLAIMS BY FEDERAL COPYRIGHT LAW OR OTHER FEDERAL STATUTES
- § 11:47 Federal preemption
- § 11:48 [Reserved]
- § 11:49 Federal preemption—Preemption rules of the Copyright Act
- § 11:50 Federal Preemption—Conflict preemption
- § 11:51 Federal preemption—Privacy rights
- § 11:52 —Right of publicity
- § 11:53 ——Names
- § 11:54 ——Pictures and photographs
- § 11:55 ——Sounds
- § 11:56 ——Audio and video recordings of performances
- § 11:57 Authors' Opinion: Federal preemption of performance-based right of publicity claims
- § 11:58 Defendant's copyright ownership
- § 11:59 —Rights and obligations of photographers
- § 11:60 ——Ownership of copyright in photographs of people
- § 11:61 ——Obligations of photographers
- § 11:62 —Is the owner or licensee of copyright in a likeness of a person immune from liability for privacy invasion or publicity infringement?
- § 11:63 —Authors' comment: copyright ownership is no defense to right of publicity infringement

### E. IMMUNITIES, CONSENT, AND PRIVILEGES

- § 11:64 Immunities generally
- § 11:65 Consent

11:66	Governmental immunities
11:67	Charitable or religious immunity
11:68	The workers compensation exclusivity rule
11:69	The "Litigation," "Fair Reporting" and "Common
	Interest" privileges

### F. INVASION OF PRIVACY AS UNCLEAN HANDS TO DEFEAT OTHER CLAIMS

§ 11:70 Unclean hands

**Table of Laws and Rules** 

**Table of Cases** 

Index