

# Chapter 10

## USE OF INTELLECTUAL PROPERTY IN THE MEDIA

Mark Sableman & Jennifer Visintine  
Thompson Coburn LLP  
St. Louis, Missouri

“Intellectual property” refers to those kinds of intangible property rights that are the products of creation, thought, or invention. Trademarks, copyrights, and patents are familiar forms of intellectual property. To encourage the creation and proper exploitation of intellectual property, the law provides protections against the misappropriation of these valuable but often elusive assets.

Opportunities for the infringement, misappropriation or misuse of intellectual property abound in the context of the media. A news story might improperly use copyrighted material. A person’s image may be impermissibly used to promote a product or event. A company’s trademark (which may be nothing more than a single word) might be used in such a fashion as to constitute infringement. This article will review three aspects of intellectual property law that have particular relevance for the media, and explain how such intellectual property can be used lawfully in the media.

### A. Fair Use of Copyrighted Material

#### Basic Concepts of Copyright Law

The U.S. Constitution provides for the protection of copyrights under the intellectual property clause, which grants Congress the power “To Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>1</sup> Congress has provided for copyright protection since 1790, but the statute has grown increasingly complex over the years.

A copyright is the right of the author of a creative work to control its publication, adaptation, distribution, display, or performance for a limited period of time. Copyright protection is not limited to writings; it is available to any “original works of authorship fixed in any tangible medium of expression,”<sup>2</sup> such as literary works, dramatic works, pictures, motion pictures and sound recordings.<sup>3</sup> “Authors” for copyright purposes are not limited to writers, but include as well photographers, artists, map makers, architects, musicians, and writers of computer software, among others.

#### Formalities and Duration

A copyright notice is not required in order for the author to have a copyright. Nor is a formal registration required until litigation ensues. Under current law, a copyright springs into being automatically when a work is created (that is, when the work is fixed in a tangible form).<sup>4</sup>

#### Ownership of Copyrights

Normally, the author of an original work owns the copyright, even if the author allows others to publish or otherwise use the copyrighted work. For example, a free-lance writer can sell a story to a newspaper and still retain the right to adapt it for magazine article, a book, or a screenplay. In such cases, copyright protection lasts for the life of the author plus 70 years.

The United States Supreme Court addressed free-lancer rights in *New York Times Co., Inc. v. Tasini*.<sup>5</sup> Several free-lance authors contributed articles to newspapers and magazines, and the publishers in turn licensed rights to copy and sell their publications to computer database companies. Although the publishers owned copyrights in their own publications in their entirety, the individual authors retained the copyrights in their individual articles. As a result, the court concluded that both the publishers and the computer database companies had infringed the authors’ copyrights, by republishing them in the computer databases without the authors’ permission.

In contrast, if a work is created by an employee within the scope of his or her employment, it is a “work for hire,” and the employer owns the copyright.<sup>6</sup> A similar situation arises if a work is specially ordered or commissioned, if the parties expressly agree that it is a “work for hire.”<sup>7</sup> Copyright protection for “works for hire” lasts for the shorter of ninety-five (95) years from the year of publication, or 120 years from the year of creation.<sup>8</sup>

## **The Public Domain**

After a copyright expires, the formerly protected work enters the “public domain”, and is free for all to use.<sup>9</sup> For example, the novel *The Adventures of Huckleberry Finn* and the poetry of Emily Dickenson have entered the public domain, and may be used in their entirety without liability for copyright infringement. In addition, a work can enter the public domain if: (1) it is a work of the federal government;<sup>10</sup> (2) the author dedicates the work to the public domain; or (3) the work was first published before 1978 without a proper copyright notice. Although in the past there was no formal way of dedicating a work to the public domain, the “Creative Commons” organization now facilitates full or partial dedicating of works to the public domain.<sup>11</sup>

## **Copyright Infringement**

Reproduction of a significant portion of an author’s words is one form of copyright infringement. (The related, but different, academic ethical issue is plagiarism.) Copyright protection also extends beyond an author’s exact words or an artist’s precise expressions. Copyright infringement can occur when one copies another’s sequence of thoughts, choice of words, emphasis, and/or arrangement. It is the essence of an artist’s creativity that is protected, not the literal presentation only.

Generally, to establish copyright infringement, a plaintiff must prove that he owns a valid copyright and that the alleged infringer copied the protected work. Direct evidence that an alleged infringer copied a work is rarely available; most cases rely on circumstantial evidence.

The standard legal test applied when a plaintiff presents circumstantial evidence considers two factors: access and substantial similarity.<sup>12</sup> In most instances, “access” to the copyrighted work is easily proven. Thus, the key factor to determine copyright infringement is whether there is “substantial similarity” between a copyrighted work and the allegedly infringing work. There is no minimal amount of copying that is automatically permissible; only the copying of ideas that does not result in substantial similarity is permissible. Since *ideas* are not copyrightable (only the *expression* of ideas is protected), the copying of ideas does not infringe anyone’s copyright. Additionally, copying that does not result in substantial similarity is permissible. Paraphrasing an author’s writings can be considered substantially similar if it appropriates the author’s creative expression.<sup>13</sup> The respected jurist Judge Learned Hand phrased the issue as whether the ordinary observer of two works would be disposed to overlook disparities between the works, unless he set out to detect them,<sup>14</sup> and would regard their aesthetic appeal as the same.

## **Fair Use of Copyrighted Materials**

Not all copying of a protected work constitutes copyright infringement, even if a substantial similarity exists. The “fair use” doctrine specifically allows some use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research.<sup>15</sup> For example, when television news programs used short clips of a movie in connection with an actor’s obituary, a court determined that such news reporting was protected by the fair use doctrine.<sup>16</sup>

Whether the fair use doctrine allows use of a copyrighted work must be determined on a case-by-case basis.<sup>17</sup> The Copyright Act<sup>18</sup> lists four non-exclusive factors to consider, including: (1) the purpose and character of the use, including whether it is commercial or educational; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>19</sup>

In the context of the news media, the fair use doctrine has been limited where the courts have determined that the use of copyrighted material has gone beyond news reporting and rises to the level of appropriating the copyrighted material of others for commercial gain. For instance, in *Jackson v. MPI Home Video*,<sup>20</sup> commercial sale of a videotape of Jesse Jackson’s speech to a Democratic National Convention was found to infringe Jackson’s copyright despite the assertion that the speech was a newsworthy event, thus invoking the fair use doctrine. Similarly, in *Los Angeles News Service v. Reuters Television International Ltd.*,<sup>21</sup> the court found a television news agency liable for copyright infringement after it copied and transmitted a video of the Los Angeles riot to its subscribers, who paid an annual fee. In this case, the court rejected the fair use defense despite the newsworthy nature of the event, in part because of the commercial nature of the use.

Reproduction of copyrighted photographs of others by the media, such as newspaper publishers, can violate the copyright law.<sup>22</sup> For example, copyright infringement issues may arise when a copyrighted photograph of an individual is used to illustrate a news report about that individual. Although some media use of photographs may be impliedly authorized (i.e., where a company posts pictures of its employees on the internet for the media), other uses—even long-established traditional uses like the use of yearbook photos—may raise copyright infringement concerns. For example, if a news reporter obtains a photograph of an individual from a yearbook, and uses the photograph in connection with a news report, the photographer or yearbook publisher might claim infringement. The burden would then shift to the news medium to establish a fair use

defense. One way to improve the chances for that defense is to portray the photograph in context, such as by showing another individual looking at the yearbook.

When the copyrighted photograph itself is “newsworthy,” the case is stronger for fair use. For example, a professional photographer took controversial photographs of the former Miss Puerto Rico Universe for her modeling portfolio, and the pictures were subsequently published on the front page of a newspaper.<sup>23</sup> The controversy surrounding the photographs was whether nude or partially nude photographs are appropriate for a Miss Puerto Rico Universe. In this case, the court determined that the photograph itself was newsworthy because of its controversial nature, and rejected the photographer’s copyright infringement claim on the grounds that the newspaper’s use of the photograph was fair use.

The fair use doctrine has also been applied to artistic works that are based on or incorporate a copyrighted work, where the artistic work comments on or criticizes a copyrighted work. The leading case in fair use and parody analysis is *Campbell v. Acuff-Rose Music, Inc.*,<sup>24</sup> in which the United States Supreme Court held that a rap version of Roy Orbison’s song “Oh, Pretty Woman” could be perceived as a parody, and therefore did not constitute copyright infringement. In the Court’s analysis, the “transformative” nature of the work (i.e., whether it added something new to the original work, thereby altering the expression, meaning, or message) was crucial. Thus, if a work is sufficiently transformative, a new work may be viewed as fair use, even if it appropriates some of the creative expression of a copyrighted original.

The fair use doctrine has First Amendment overtones in certain applications. A number of cases have implicitly recognized this, and these courts have based their decisions on the principle that the public interest requires that certain uses of otherwise protected material (for news or criticism) must be found fair.<sup>25</sup> This exception is based on the principle that the copyright laws are intended to encourage contributions to public knowledge. There are quantitative as well as qualitative limits to this use. As stated in one decision arising under the 1909 Copyright Act: “In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another.”<sup>26</sup>

## **B. Fair Use of Trademarks**

### **Basic Concepts of Trademark Law**

Trademarks and service marks (collectively referred to herein as “trademarks”) are those words, names, symbols, and devices that merchants and businesses use to identify their goods and services, and to distinguish their goods and services from those of others.<sup>27</sup> Examples of trademarks include the name “Cadillac” for cars, the “swoosh” image for Nike shoes and clothing, and the phrase “I’m Lovin’ It” for McDonald’s restaurants.

Although trademarks are often registered with the United States Patent and Trademark Office, registration is not necessary to receive protection. However, those marks that are registered are governed by the Lanham Act,<sup>28</sup> and receive a broader scope of protection than unregistered or state registered trademarks. Registered marks are typically displayed with the ® symbol; unregistered marks may be displayed with a <sup>TM</sup> or <sup>sm</sup> symbol.

### **Infringement**

The legal standard for trademark infringement is “likelihood of confusion”. The confusion may relate to a misunderstanding as to the source of goods or services.<sup>29</sup> For instance, the unauthorized use of the mark “Cadillac” on tires would probably lead people to mistakenly believe that the source of the tires was General Motors. Confusion may also relate to an incorrect assumption that one party has endorsed the goods or services of another.<sup>30</sup> For instance, the unauthorized use of the Nike “swoosh” design on a poster announcing a bicycle race would probably lead people to mistakenly believe that Nike endorsed the event.

### **Fair Use of Trademarks**

Trademark law allows use of another’s trademark under certain circumstances. Specifically, the law recognizes two types of “fair use”: (1) descriptive fair use; and (2) nominative fair use.

The first type of fair use, descriptive fair use, allows use of a trademark, in good faith, if used *only* to describe goods or services. For example, a shoe manufacturer is entitled to use the phrase “And when we say it *feels like a sneaker*, we’re not just stringing you along”, despite a competitor’s prior use of the phrase “Looks Like a Pump, *Feels Like a Sneaker*.”<sup>31</sup> Descriptive fair use is based on the fact that a word used as a trademark may also describe a person, a place, or an attribute of a product. If the trademark holder had the exclusive right to control use of the trademark, it would limit the use of descriptive words in ordinary language.

The United States Supreme Court addressed this defense in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*,<sup>32</sup> in which both parties used the term “microcolor” (or some slight variation) in advertisements for the sale of permanent

makeup. The registrant of the trademark MICRO COLORS alleged that the defendant's use of the term "microcolor" was trademark infringement. The defendant raised the fair use defense, and the Supreme Court held that fair use could be found even if there was also some likelihood of consumer confusion. In effect, a party may use a trademark under the fair use exception even if there is a chance that consumers will be confused, *if* the term "is used descriptively, not as a mark, fairly, and in good faith."

*Packman v. Chicago Tribune Company*<sup>33</sup> provides an example of fair use of a trademark in the media. In this case, the Chicago Tribune used "The Joy of Six" as a front-page headline following the Chicago Bulls' sixth National Basketball Association ("NBA") championship, and also used it on t-shirts and other memorabilia that depicted reproductions of the paper. The plaintiff owned a trademark registration for THE JOY OF SIX, and accused the *Chicago Tribune* of trademark infringement. In its defense, the *Tribune* argued that its use of mark was descriptive, and the court agreed, indicating that the phrase was descriptive of the joy associated with the Chicago Bulls' sixth NBA championship. As a result, the *Tribune's* use of the phrase was "fair use."

The second type of fair use, nominative fair use, allows use of a trademark to refer to *the trademark owner's* goods and services.<sup>34</sup> Often, it is "virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference, or any other such purpose without using the mark."<sup>35</sup> For example, imagine saying the following sentence without using any of the trademarks: "Last summer my family went to Disney World, stayed at Holiday Inn, and went to Pizza Hut for dinner." Such sentence would be difficult, and would likely begin, "Last summer my family went to the tourist attraction near Orlando, Florida where people dress-up as characters from animated movies and cartoons." Nominative fair use also allows advertisers to refer to their competitors marks (i.e., Coca-Cola advertisements may refer to Pepsi products for the purpose of comparison).

For use of another's trademark to qualify as nominative fair use, courts have usually imposed three requirements: (1) the plaintiff's goods or services are not readily identifiable without use of the trademark; (2) only so much of the mark is used as is reasonably necessary to identify the product; and (3) the use must not do anything to suggest sponsorship or endorsement by the trademark holder.<sup>36</sup>

In *WCVB-TV v. Boston Athletic Association*,<sup>37</sup> the court determined that even when one television station was the "official" broadcaster of the Boston Marathon, a rival station could use the phrase "Boston Marathon" in connection with a broadcast of the public event. The court allowed use of the mark BOSTON MARATHON because the words "do more than call attention to Channel 5's program; they also *describe* the event that Channel 5 will broadcast. Common sense suggests . . . that a viewer who sees those words flash upon the screen will believe simply that Channel 5 will show, or is showing, or has shown, the marathon, not that Channel 5 has some special approval from the trademark holder to do so."<sup>38</sup>

In another example involving the media, *New Kids on the Block v. News America Publishing, Inc.*,<sup>39</sup> a musical group accused two newspapers of trademark infringement based on use of the group's name in connection with a telephone survey regarding the most popular band member. The court developed the three-factor test described above, and based on those factors, concluded that the newspapers' use of the group's name constituted nominative fair use (and thus, not trademark infringement).

## C. The Right of Publicity

### Basic Concepts of the Right of Publicity

Under the law, every person, whether a celebrity or an ordinary person, possesses the right to control and exploit the commercial use of his or her name, likeness, or personal attributes. This concept is often referred to as the "right of publicity." Although this right may apply to all individuals,<sup>40</sup> it is particularly important to celebrities who use their name, likeness or even their voice for economic gain. For example, basketball player LeBron James entered an endorsement contract with Nike for \$90 million dollars before he ever played professional basketball. Similarly, the estate of the late James Dean has earned millions more by licensing Dean's image on posters, t-shirts, and coffee mugs than its namesake ever earned as an actor.

The policy behind the right of publicity flows from the concept that protecting a person's name or likeness is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage.<sup>41</sup> The right of publicity also preserves the value of the names and likenesses of people, which in turn preserves the value of an endorsement (particularly, endorsements by celebrities). Although federal law does not protect this right, the right of publicity is protected in the majority of states, either by statute or under common law.

Note that the right of publicity primarily applies to the *commercial* use of a name or image-i.e., use in commercial promotion and advertising. The right of publicity has been successfully invoked to protect, for instance, a baseball player's right to control the use of his photograph in connection with the sale of gum (i.e., in the context of baseball trading cards).

## News and Editorial Uses

News reporting and other protected First Amendment activities are generally exempt from restrictions imposed by the right of publicity. For example, publication of Joe Namath's photograph on the cover of *Sports Illustrated* was held not to infringe Namath's right of publicity, even though his likeness was being used to promote magazine sales.<sup>42</sup> One court held that newsworthy public figures, such as Jesse Jackson, cannot use the right of publicity to challenge the use of their pictures on the covers of magazines such as *Time* or *Newsweek*.<sup>43</sup> Other examples of images which have been found to be not within the sphere of right of publicity protection include: news photographs of Lyle Lovett and Julia Roberts on their wedding day;<sup>44</sup> the use of photographs of crime victims in a book jacket for a non-fiction crime story;<sup>45</sup> photographs of nude bathers used in a nudist guide book;<sup>46</sup> the publication of semi-nude photographs of the actress Ann-Margaret;<sup>47</sup> and the broadcast of excerpts of a local wet T-shirt contest (even though a cigarette company sponsored the contest and used its logo on the T-shirts).<sup>48</sup> Similarly, the right of publicity cause of action has not been successfully asserted in cases involving use of photographs for political advertisements.

The First Amendment has also been applied to allow filmmakers and authors to produce unauthorized works about particular individuals. For example, a documentary filmmaker successfully defended, on First Amendment grounds, a right of publicity claim brought by an individual he had interviewed.<sup>49</sup> The plaintiff alleged that the filmmaker's use of the interview violated his right of publicity, even though he had voluntarily participated in the interview, because he was not aware that the interview would be used for pecuniary gain. However, the court concluded that the work was not pure commercial speech, and that it addressed a matter of important public concern. Thus, use of the interview was allowed under the First Amendment. In other decisions based, at least in part, on the First Amendment, courts have also allowed the publication of a still photograph of an actor that was taken from a motion picture,<sup>50</sup> and the production of an unauthorized mini-series about the music group the Temptations.<sup>51</sup>

The line between newsworthy use and commercial exploitation can sometimes be a thin or uncertain one. The courts sometimes construe the newsworthy use exception narrowly where entertainers are involved. The commercial use versus newsworthy use distinction also sometimes tends to put form over content, since the use of celebrity in certain traditional formats, such as books, newspapers, magazines and broadcast news reports, is often considered presumptively exempt. The same use might be considered an infringement of the right of publicity if it arose in a non-journalistic context.

## Artistic Uses

In addition to the exception for newsworthy use, the courts have also recognized an exception to the right of publicity doctrine based upon *artistic expression*. For example, the play *Six Degrees of Separation* was inspired by a real-life hoax and fraud perpetrated on some prominent New York families. The perpetrator of the scheme attempted to sue the playwright, John Guare, on a right of publicity theory, but the court would not permit the suit because New York's right of publicity only protects against advertising and not works of fiction or satire.<sup>52</sup> Similarly, the estate of Janis Joplin unsuccessfully sought to enjoin a play based on her life.<sup>53</sup> In denying a claim against a sculptor of limited-edition sculptures portraying the model Cheryl Tiegs, one court stated that "works of art, including sculptures, convey ideas, just as do literature, movies or theater. . . . An artist may make a work of art that includes a recognizable likeness of a person without her or his consent and sell at least a limited number of copies without violating the right of publicity."<sup>54</sup>

As with the border between news and commercial uses, the border between protected artistic uses and unprotected commercial uses often presents hard cases. In Missouri, the right of publicity has been held to prohibit the use of an individual's name or likeness to refer to that individual, without consent, and with the intent to obtain a commercial advantage.<sup>55</sup> In a case decided by the Missouri Supreme Court, *Doe v. TCI Cablevision*,<sup>56</sup> a former professional hockey player successfully argued that the creator of the comic book *Spawn* had violated his right to publicity by naming a character after him, and by marketing *Spawn* products specifically to hockey fans. The court in the case essentially found the commercial element overshadowed the artistic aspects of the work.

In a case very similar to *Doe v. TCI Cablevision*, the California Supreme Court held that DC Comics' use of characters based on singers Johnny and Edgar Winter was protected by the First Amendment.<sup>57</sup> The characters were named Johnny and Edgar Autumn, and were depicted as half-human, half-worm beings. Despite the depiction of the singers as half-worm, numerous other characteristics resembled the Winter brothers, including their long white hair and albino features. The court concluded that the comic book contained "significant expressive content" beyond the singer's identity, and that, to the extent the drawings resemble the Winter brothers, the drawings are distorted for parodic or caricature purposes. Thus, they were protected by the First Amendment as expressive works.

## Incidental Uses

Another exception to the right of publicity is the merely *incidental* literary or artistic use of a celebrity's name, likeness

or other attribute. For instance, one court has listed as clearly permissible uses of a photograph in the back of a stage set, a comedian's imitation of a famous figure, or a celebrity's likeness on the cover of a biography.

## Conclusion

Intellectual property is a significant and growing element in the United States marketplace. Conflicts involving media use of intellectual property are likely to arise with increasing frequency. Members of the news media will need to be sensitive to intellectual property rights, and intellectual property owners will need to understand and respect First Amendment and other limits on their rights.

## Footnotes

- 1 U.S. Const., Art. I, § 8, Clause 8.
- 2 17 U.S.C. § 102(a).
- 3 17 U.S.C. § 102.
- 4 17 U.S.C. § 408.
- 5 533 U.S. 483 (2001).
- 6 17 U.S.C. § 101; 17 U.S.C. § 201.
- 7 17 U.S.C. § 101.
- 8 17 U.S.C. § 302.
- 9 For a discussion of the duration of copyright protection, see *Duration of Copyright*, published by the United States Copyright Office. Available at <http://www.copyright.gov/circs/circ15a.pdf>.
- 10 17 U.S.C. § 105.
- 11 Creative Commons, See "Legal Concepts," <http://creativecommons.org/about/legal/>.
- 12 See, e.g., *Stronback v. New Line Cinema*, 384 F.3d 283 (6th Cir. 2004); *General Universal Systems, Inc. v. Lee*, 379 F.3d 131 (5th Cir. 2004); *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004).
- 13 *Salinger v. Random House*, 818 F.2d 252 (1987).
- 14 *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960).
- 15 17 U.S.C. § 107.
- 16 *Video-Cinema Films, Inc. v. Cable News Network*, 2001 WL 1518264 (S.D.N.Y. 2001).
- 17 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 553 (1985).
- 18 17 U.S.C. § 101 et seq.
- 19 17 U.S.C. § 107.
- 20 694 F. Supp. 483 (N.D. Ill. 1988).
- 21 149 F.3d 987 (9th Cir. 1998).
- 22 *Nunez v. Caribbean International News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000).
- 23 *Id.* at 21.
- 24 510 U.S. 569 (1994).
- 25 See e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (Howard Hughes biography); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (Zapruder film of Kennedy assassination).
- 26 *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied* 385 U.S. 1009 (1967).
- 27 15 U.S.C. § 1127.
- 28 15 U.S.C. § 1051 et seq.
- 29 15 U.S.C. § 1114.
- 30 15 U.S.C. § 1125.
- 31 *U.S. Shoe Corp. v. Brown Group, Inc.*, 740 F. Supp. 196 (S.D.N.Y. 1990) (emphasis added).
- 32 125 S.Ct. 542 (2004).
- 33 267 F.3d 628 (7th Cir. 2001).
- 34 See, e.g., *Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002) (discussing the differences between descriptive fair use and nominative fair use).
- 35 *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 307 (9th Cir. 1992).
- 36 *Id.* at 308.
- 37 *WCVB-TV v. Boston Athletic Association*, 926 F.2d 42 (1st Cir. 1991).
- 38 *Id.* at 46.
- 39 971 F.2d 302 (9th Cir. 1992).
- 40 Although all individuals have a right of publicity in some states, other state laws require that the individual is a celebrity, or has acted in some way to exploit the value of his or her identity. See, e.g., *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123 (2nd Cir. 1984) (**rejecting a right of publicity claim based, in part, on plaintiff's claim that she was a "private" individual**).
- 41 See *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994).
- 42 *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10, 11 (1975), *aff'd*, 39 N.Y.2d 897, 386 N.Y.S.2d 397 (1976).
- 43 *Jackson v. MPI Home Video*, 694 F. Supp. 483, 492 (N.D. Ill. 1988).
- 44 *Time Inc. v. Sandy Creek Partners, L.P.*, 825 F. Supp. 210 (S.D. Ind. 1993).
- 45 *In re HarperCollins Publishers, Inc.*, No. 93-5501 (6th Cir. April 20, 1993).
- 46 *Creel v. Crown Publishers*, 115 A.D.2d 414, 496 N.Y.S.2d 219, 220 (N.Y. App. Div. 1985).
- 47 *Ann-Margaret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980).

- 48 *McCarville v. American Tobacco Co.*, 11 Media L. Rptr. 2344 (N.Y. Sup. Ct. 1985).
- 49 *Nichols v. Moore*, 334 F.Supp.2d 944, 955-56 (E.D. Mich. 2004).
- 50 *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).
- 51 *Ruffin-Steinback v. dePasse*, 82 F. Supp. 723 (E.D. Mich. 2000).
- 52 *Hampton v. Guare*, 20 Media L. Rptr. 1160 (N.Y. Sup. Ct. 1992), *aff'd*, 600 N.Y.S.2d 57 (N.Y. App. Div. 1993).
- 53 *Joplin Enters. v. Allen*, 19 Media L. Rptr. 2093 (W.D. Wash. 1991), *revised*, 795 F. Supp. 349 (W.D. Wash. 1992).
- 54 *Simeonov v. Tiegs*, 602 N.Y.S.2d 1014 (N.Y. City Civ. Ct. 1993).
- 55 *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368-69 (Mo. 2003).
- 56 110 S.W.3d 363.
- 57 *Winter v. DC Comics*, 69 P.3d 473 (Ca. 2003).