ST. THOMAS UNIVERSITY SCHOOL OF LAW

INTRODUCTION TO LEGAL STUDIES (ILS)
CONDITIONAL, SECTION 1

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WEEK OF JUNE 6-10, 2016

ASSIGNMENT FOR FRIDAY, JUNE 10

DAY 5 TOPIC: RIGHT OF PUBLICITY AND REVIEW

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DAY 5 ASSIGNMENT

ASSIGNMENT FOR DAY 5 (FRIDAY, JUNE 10)

First, read the study questions. They will help you with the readings.

Second, carefully read the materials in the order shown below. Fully brief any cases and bring your printed briefs to class:

- Florida right of publicity statute
- *White v. Samsung Electronics America, Inc.*

Finally, after you've read the assigned materials, answer the study questions. Be prepared to discuss all the materials in class. To answer the study questions, you will likely need to go back and reconsider the readings.

DAY 5 STUDY QUESTIONS

Florida right of publicity statute

1. Read the Florida Right of Publicity statute carefully.
2. Which of the following are protected from unauthorized commercial or advertising uses?
    a. A drawing of a celebrity.
    b. A photograph of Professor Nathenson.
    c. A drawing of Pinocchio.
    d. George Clooney's voice.
    e. Scarlett Johansson's signature.
    f. The Coca-Cola logo.
    g. The use of the phrase "That's so hot"
3. Who would have right of publicity rights to a textual reference to the character Vito Corleone from *The Godfather* that is used in an advertisement without authorization?
    a. The author of the book Mario Puzo.
    b. The owners of the films.
    c. The actor Marlon Brando who played elderly Corleone in *Godfather I*.
    d. Robert DeNiro who played young Corleone in *Godfather II*.
    e. Nobody.
4. Who would have right of publicity rights to a photograph of the character Vito Corleone as portrayed by the actor Marlon Brando from *Godfather I* that is used in an advertisement without authorization? Same choices as question 3 above.
5. Suppose somebody takes a photo of the celebrity Jerky Jerkeson and uses it in an advertising campaign to save whales. Jerkeson is angry that the photo was used without authorization. Surprisingly, the advertising campaign improves Jerkeson's reputation and as a result, he is asked to appear in many films and he makes a lot of money. Does Jerkeson have a claim under the statute? What kind of damages might he obtain?
6. Channel 8 News runs a story about Jerky Jerkeson, which includes mention of his name and uses stock photographs of Jerkeson. The story reports that Jerkeson likes to eat whales.
7. Channel 8 News runs an ad for the news story from question 6 during the afternoon. It uses a photograph of Jerky Jerkeson and says "Shocking news about Jerky Jerkesen! Film at 11!"
8. Professor Nathenson is at a *Cheap Trick* rock concert to celebrate the band's entry in the Rock 'N' Roll Hall of Fame. While at the concert, a photographer takes pictures of the crowd, which is filled with graying and overweight Baby Boomers. The photograph is later used by Jonston & Jonston Inc. in an advertisement for a bone-loss supplement for elderly people called BONE-FREE! Professor Nathenson can be seen in the photo but his name is not mentioned in the ad.

9. Same facts as # 8 but further assume that Jonston & Jonston posts the advertisement to its wall on Facebook. On Facebook, somebody adds a comment to the posting saying "Hey, that's Professor Nathenson in that ad! I didn't know he was old!"

10. Jonston & Jonston uses a photograph of FDR (who died towards the end of the Second World War). The ad says "FDR won the war for us. Now you can win the war against bone loss! Buy BONE-FREE!"

White v. Samsung

1. The opinion you are reading is not the actual court decision. Instead, in an earlier opinion, a 3-judge panel of the Ninth Circuit held in favor of Vanna White. The defendant Samsung moved for rehearing by the panel or for rehearing by the Ninth Circuit en banc.

    a. En banc rehearing is a rehearing that includes not just the three judges on the original panel but also any active, nonrecused judges on the appellate court. (There are further complications of en banc rehearing in the Ninth Circuit that I will not get into here).

    b. Simply put, Samsung asked the Ninth Circuit for a "re-do" and it refused. The opinion you are reading is from Judge Kozinski's dissent from the denial of rehearing en banc.

2. Explain what Kozinski means when he says Vanna White wants the right to prevent advertisers from "reminding" the public of celebrities.

3. In paragraphs 2 and 3, Judge Kozinski says "reducing too much to private property can be bad medicine." Explain what he means using examples from our readings this week.

4. In paragraph 12, Kozinski says that "Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large." Explain what he means using examples from our readings this week.

5. In paragraph 15, Kozinski asks "*Should* White have the exclusive right to something as broad and amorphous as her "identity"? Why does he use the word "should" rather than "does"? What is the difference between and "ought" and an "is"? Is the distinction important?

6. In paragraph 21, Judge Kozinski argues that the "dormant Commerce Clause" prevents state IP laws from prejudicing other states' interests. Should IP laws be federal and uniform? Or are there benefits in allowing states to experiment with different laws even if that creates some disuniformity?

7. In paragraph 31, Judge Kozinski calls the Ninth Circuit the "Court of Appeals for the Hollywood Circuit." Why does he say this? Go online and find out which states fall within the Ninth Circuit. Are there reasons to be concerned that Ninth Circuit law regarding celebrities might have an impact far beyond the Ninth Circuit?

FLORIDA RIGHT OF PUBLICITY STATUTE

Florida Stat. § 540.08. Unauthorized publication of name or likeness.

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

(a) Such person; or

(b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness; or

(c) If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and surviving children.

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

(3) If a person uses the name, portrait, photograph, or other likeness of a member of the armed forces without obtaining the consent required in subsection (1) and such use is not subject to any exception listed in this section, a court may impose a civil penalty of up to $1,000 per violation in addition to the civil remedies contained in subsection (2). Each commercial transaction constitutes a violation under this section. As used in this section, the term "member of the armed forces" means an officer or enlisted member of the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, the Florida National Guard, and the United States Reserve Forces, including any officer or enlisted member who died as a result of injuries sustained in the line of duty.

(4) The provisions of this section shall not apply to:

(a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;

(b) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or

(c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

(5) No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person.

(6) As used in this section, a person's "surviving spouse" is the person's surviving spouse under the law of her or his domicile at the time of her or his death, whether or not the spouse has later remarried; and a person's "children" are her or his immediate offspring and any children legally adopted by the person. Any consent provided for in subsection (1) shall be given on behalf of a minor by the guardian of her or his person or by either parent.

(7) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy.

WHITE V. SAMSUNG ELECTRONICS AMERICA, INC.

United States Court of Appeals for the Ninth Circuit

989 F.2d 1512

Argued and Submitted June 7, 1991

Decided July 29, 1992

As Amended Aug. 19, 1992

Order below dated Mar. 18, 1993

Before Goodwin, Pregerson and Alarcon, Circuit Judges.

[1] The panel has voted unanimously to deny the petition for rehearing. Circuit Judge Pregerson has voted to reject the suggestion for rehearing en banc, and Circuit Judge Goodwin so recommends. Circuit Judge Alarcon has voted to accept the suggestion for rehearing en banc.

[2] The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

[3] The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Kozinski, Circuit Judge, with whom Circuit Judges O'Scannlain and Kleinfeld join, dissenting from the order rejecting the suggestion for rehearing en banc.

I

[1] Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts. Clint Eastwood doesn't want tabloids to write about him. Rudolf Valentino's heirs want to control his film biography. The Girl Scouts don't want their image soiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars." Pepsico doesn't want singers to use the word "Pepsi" in their songs. Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Year's Eve. Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis. Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs. And scads of copyright holders see purple when their creations are made fun of.

[2] Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

[3] So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.

[4] The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to *remind* the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It conflicts with the Copyright Act and the Copyright Clause. It raises serious First Amendment problems. It's bad law, and it deserves a long, hard second look.

II

[5] Samsung ran an ad campaign promoting its consumer electronics. Each ad depicted a Samsung product and a humorous prediction: One showed a raw steak with the caption "Revealed to be health food. 2010 A.D." Another showed Morton Downey, Jr. in front of an American flag with the caption "Presidential candidate. 2008 A.D."[12] The ads were meant to convey—humorously—that Samsung products would still be in use twenty years from now.

[6] The ad that spawned this litigation starred a robot dressed in a wig, gown and jewelry reminiscent of Vanna White's hair and dress; the robot was posed next to a Wheel-of-Fortune-like game board. See Appendix. The caption read "Longest-running game show. 2012 A.D." The gag here, I take it, was that Samsung would still be around when White had been replaced by a robot.

[7] Perhaps failing to see the humor, White sued, alleging Samsung infringed her right of publicity by "appropriating" her "identity." Under California law, White has the exclusive right to use her name, likeness, signature and voice for commercial purposes. Cal. Civ. Code § 3344(a); *Eastwood* v. *Superior Court,* 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342, 347 (1983). But Samsung didn't use her name, voice or signature, and it certainly didn't use her likeness. The ad just wouldn't

[12] I had never heard of Morton Downey, Jr., but I'm told he's sort of like Rush Limbaugh, but not as shy.

have been funny had it depicted White or someone who resembled her - the whole joke was that the game show host(ess) was a robot, not a real person. No one seeing the ad could have thought this was supposed to be White in 2012.

[8] The district judge quite reasonably held that, because Samsung didn't use White's name, likeness, voice or signature, it didn't violate her right of publicity. 971 F.2d at 1396-97. Not so, says the panel majority: The California right of publicity can't possibly be limited to name and likeness. If it were, the majority reasons, a "clever advertising strategist" could avoid using White's name or likeness but nevertheless remind people of her with impunity, "effectively eviscerating" her rights. To prevent this "evisceration," the panel majority holds that the right of publicity must extend beyond name and likeness, to any "appropriation" of White's "identity" - anything that "evokes" her personality. *Id.* at 1398-99.

III

[9] But what does "evisceration" mean in intellectual property law? Intellectual property rights aren't like some constitutional rights, absolute guarantees protected against all kinds of interference, subtle as well as blatant. They cast no penumbras, emit no emanations: The very point of intellectual property laws is that they protect only against certain specific kinds of appropriation. I can't publish unauthorized copies of, say, Presumed Innocent; I can't make a movie out of it. But I'm perfectly free to write a book about an idealistic young prosecutor on trial for a crime he didn't commit. So what if I got the idea from *Presumed Innocent*? So what if it reminds readers of the original? Have I "eviscerated" Scott Turow's intellectual property rights? Certainly not. All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy.[15]

[10] The majority isn't, in fact, preventing the "evisceration" of Vanna White's existing rights; it's creating a new and much broader property right, a right unknown in California law. It's replacing the existing balance between the interests of the celebrity and those of the public by a different balance, one substantially more favorable to the celebrity. Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to *anything that reminds the viewer of her*. After all, that's all Samsung did: It used an inanimate object to remind people of White, to "evoke [her identity]," 971 F.2d at 1399.

[11] Consider how sweeping this new right is. What is it about the ad that makes people think of White? It's not the robot's wig, clothes or jewelry; there must be ten million blond women (many of them quasi-famous) who wear dresses and jewelry like White's. It's that the robot is posed near the "Wheel of Fortune" game board. Remove the game board from the ad, and no one

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[15] In the words of Sir Isaac Newton, "if I have seen further it is by standing on [the shoulders] of Giants." Letter to Robert Hooke, Feb. 5, 1675/1676.

Newton himself may have borrowed this phrase from Bernard of Chartres, who said something similar in the early twelfth century. Bernard in turn may have snatched it from Priscian, a sixth century grammarian. *See Lotus Dev. Corp.* v. *Paperback Software Int'l,* 740 F. Supp. 37, 77 n.3 (D. Mass. 1990).

would think of Vanna White. *See* Appendix. But once you include the game board, anybody standing beside it - a brunette woman, a man wearing women's clothes, a monkey in a wig and gown - would evoke White's image, precisely the way the robot did. It's the "Wheel of Fortune" set, not the robot's face or dress or jewelry that evokes White's image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living.[18]

[12] This is entirely the wrong place to strike the balance. Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. Where would we be if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity? If every author and celebrity had been given the right to keep people from mocking them or their work? Surely this would have made the world poorer, not richer, culturally as well as economically.

[13] This is why intellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us: The relatively short life of patents; the longer, but finite, life of copyrights; copyright's idea-expression dichotomy; the fair use doctrine; the prohibition on copyrighting facts; the compulsory license of television broadcasts and musical compositions; federal preemption of overbroad state intellectual property laws; the nominative use doctrine in trademark law; the right to make soundalike recordings. All of these diminish an intellectual property owner's rights. All let the public use something created by someone else. But all are necessary to maintain a free environment in which creative genius can flourish.

[14] The intellectual property right created by the panel here has none of these essential limitations: No fair use exception; no right to parody; no idea-expression dichotomy. It impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of "appropriation of identity," claims often made by people with a wholly exaggerated sense of their own fame and significance. Future Vanna Whites might not get the

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[18] Once the right of publicity is extended beyond specific physical characteristics, this will become a recurring problem: Outside name, likeness and voice, the one thing that most reliably reminds the public of someone are the actions or roles they're famous for. A commercial with an astronaut setting foot on the moon would evoke the image of Neil Armstrong. Any masked man on horseback would remind people (over a certain age) of Clayton Moore. And any number of songs - "My Way," "Yellow Submarine," "Like a Virgin," "Beat It," "Michael, Row the Boat Ashore," to name only a few - instantly evoke an image of the person or group who made them famous, regardless of who is singing.

See also Carlos V. Lozano, *West Loses Lawsuit over Batman TV Commercial,* L.A. Times, Jan. 18, 1990, at B3 (Adam West sues over Batman-like character in commercial); *Nurmi* v. *Peterson,* 1989 U.S. Dist. LEXIS 9765, 10 U.S.P.Q.2D (BNA) 1775 (C.D. Cal. 1989) (1950s TV movie hostess "Vampira" sues 1980s TV hostess "Elvira"); text accompanying notes 7-8 (lawsuits brought by Guy Lombardo, claiming big bands playing at New Year's Eve parties remind people of him, and by Uri Geller, claiming psychics who can bend metal remind people of him). *Cf. Motschenbacher,* where the claim was that viewers would think plaintiff was actually in the commercial, and not merely that the commercial reminded people of him.

chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own.[21] The public will be robbed of parodies of celebrities, and our culture will be deprived of the valuable safety valve that parody and mockery create.

[15] Moreover, consider the moral dimension, about which the panel majority seems to have gotten so exercised. Saying Samsung "appropriated" something of White's begs the question: *Should* White have the exclusive right to something as broad and amorphous as her "identity"? Samsung's ad didn't simply copy White's schtick - like all parody, it created something new. True, Samsung did it to make money, but White does whatever she does to make money, too; the majority talks of "the difference between fun and profit," 971 F.2d at 1401, but in the entertainment industry fun *is* profit. Why is Vanna White's right to exclusive for-profit use of her persona - a persona that might not even be her own creation, but that of a writer, director or producer - superior to Samsung's right to profit by creating its own inventions? Why should she have such absolute rights to control the conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine?

[16] To paraphrase only slightly *Feist Publications, Inc.* v. *Rural Telephone Service Co.,* 113 L. Ed. 2d 358, 111 S. Ct. 1282, 1289-90 (1991), it may seem unfair that much of the fruit of a creator's labor may be used by others without compensation. But this is not some unforeseen byproduct of our intellectual property system; it is the system's very essence. Intellectual property law assures authors the right to their original expression, but encourages others to build freely on the ideas that underlie it. This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art. We give authors certain exclusive rights, but in exchange we get a richer public domain. The majority ignores this wise teaching, and all of us are the poorer for it.

IV

[17] The panel, however, does more than misinterpret California law: By refusing to recognize a parody exception to the right of publicity, the panel directly contradicts the federal Copyright Act. Samsung didn't merely parody Vanna White. It parodied Vanna White appearing in "Wheel of Fortune," a copyrighted television show, and parodies of copyrighted works are governed by federal copyright law.

[18] Copyright law specifically gives the world at large the right to make "fair use" parodies, parodies that don't borrow too much of the original. Fisher v. *Dees,* 794 F.2d 432, 435 (9th Cir. 1986). Federal copyright law also gives the copyright owner the exclusive right to create (or license the

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[21] If Christian Slater, star of "Heathers," "Pump up the Volume," "Kuffs," and "Untamed Heart" - and alleged Jack Nicholson clone - appears in a commercial, can Nicholson sue? Of 54 stories on LEXIS that talk about Christian Slater, 26 talk about Slater's alleged similarities to Nicholson. Apparently it's his nasal wisecracks and killer smiles, St. Petersburg Times, Jan. 10, 1992, at 13, his eyebrows, Ottawa Citizen, Jan. 10, 1992, at E2, his sneers, Boston Globe, July 26, 1991, at 37, his menacing presence, USA Today, June 26, 1991, at 1D, and his sing-song voice, Gannett News Service, Aug. 27, 1990 (or, some say, his insinuating drawl, L.A. Times, Aug. 22, 1990, at F5). That's a whole lot more than White and the robot had in common.

creation of) derivative works, which include parodies that borrow too much to qualify as "fair use." *See Acuff-Rose Music, Inc.* v. *Campbell,* 972 F.2d 1429, 1434-35 (6th Cir. 1992).[24] When Mel Brooks, for instance, decided to parody *Star Wars,* he had two options: He could have stuck with his fair use rights under 17 U.S.C. § 107, or he could have gotten a license to make a derivative work under 17 U.S.C. § 106(b) from the holder of the *Star Wars* copyright. To be safe, he probably did the latter, but once he did, he was guaranteed a perfect right to make his movie.

[19] The majority's decision decimates this federal scheme. It's impossible to parody a movie or a TV show without at the same time "evoking" the "identities" of the actors. You can't have a mock *Star Wars* without a mock Luke Skywalker, Han Solo and Princess Leia, which in turn means a mock Mark Hamill, Harrison Ford and Carrie Fisher. You can't have a mock *Batman* commercial without a mock Batman, which means someone emulating the mannerisms of Adam West or Michael Keaton. *See* Carlos V. Lozano, *West Loses Lawsuit over Batman TV Commercial,* L.A. Times, Jan. 18, 1990, at B3 (describing Adam West's right of publicity lawsuit over a commercial produced under license from DC Comics, owner of the Batman copyright). The public's right to make a fair use parody and the copyright owner's right to license a derivative work are useless if the parodist is held hostage by every actor whose "identity" he might need to "appropriate."

[20] Our court is in a unique position here. State courts are unlikely to be particularly sensitive to federal preemption, which, after all, is a matter of first concern to the federal courts. The Supreme Court is unlikely to consider the issue because the right of publicity seems so much a matter of state law. That leaves us. It's our responsibility to keep the right of publicity from taking away federally granted rights, either from the public at large or from a copyright owner. We must make sure state law doesn't give the Vanna Whites and Adam Wests of the world a veto over fair use parodies of the shows in which they appear, or over copyright holders' exclusive right to license derivative works of those shows. In a case where the copyright owner isn't even a party - where no one has the interests of copyright owners at heart - the majority creates a rule that greatly diminishes the rights of copyright holders in this circuit.

V

[21] The majority's decision also conflicts with the federal copyright system in another, more insidious way. Under the dormant Copyright Clause, state intellectual property laws can stand only so long as they don't "prejudice the interests of other States." Goldstein v. *California,* 412 U.S. 546, 558, 37 L. Ed. 2d 163, 93 S. Ct. 2303 (1973). A state law criminalizing record piracy, for instance, is permissible because citizens of other states would "remain free to copy within their borders those works which may be protected elsewhere." *Id.* But the right of publicity isn't geographically limited. A right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity domiciled in that state. If a Wyoming resident creates an ad that

[24] How much is too much is a hotly contested question, but one thing is clear: The right to make parodies belongs either to the public at large or to the copyright holder, not to someone who happens to appear in the copyrighted work.

features a California domiciliary's name or likeness, he'll be subject to California right of publicity law even if he's careful to keep the ad from being shown in California. *See Acme Circus Operating Co.* v. *Kuperstock,* 711 F.2d 1538, 1540 (11th Cir. 1983); *Groucho Marx Prods.* v. *Day and Night Co.,* 689 F.2d 317, 320 (2d Cir. 1982); *see also Factors Etc.* v. *Pro Arts,* 652 F.2d 278, 281 (2d Cir. 1981).

[22] The broader and more ill-defined one state's right of publicity, the more it interferes with the legitimate interests of other states. A limited right that applies to unauthorized use of name and likeness probably does not run afoul of the Copyright Clause, but the majority's protection of "identity" is quite another story. Under the majority's approach, any time anybody in the United States - even somebody who lives in a state with a very narrow right of publicity - creates an ad, he takes the risk that it might remind some segment of the public of somebody, perhaps somebody with only a local reputation, somebody the advertiser has never heard of. *See* note 17 *supra* (right of publicity is infringed by unintentional appropriations). So you made a commercial in Florida and one of the characters reminds Reno residents of their favorite local TV anchor (a California domiciliary)? Pay up.

[23] This is an intolerable result, as it gives each state far too much control over artists in other states. No California statute, no California court has actually tried to reach this far. It is ironic that it is we who plant this kudzu in the fertile soil of our federal system.

VI

[24] Finally, I can't see how giving White the power to keep others from evoking her image in the public's mind can be squared with the First Amendment. Where does White get this right to control our thoughts? The majority's creation goes way beyond the protection given a trademark or a copyrighted work, or a person's name or likeness. All those things control one particular way of expressing an idea, one way of referring to an object or a person. But not allowing any means of reminding people of someone? That's a speech restriction unparalleled in First Amendment law.

[25] What's more, I doubt even a name-and-likeness-only right of publicity can stand without a parody exception. The First Amendment isn't just about religion or politics - it's also about protecting the free development of our national culture. Parody, humor, irreverence are all vital components of the marketplace of ideas. The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them, or from "evoking" their images in the mind of the public. 971 F.2d at 1399.

[26] The majority dismisses the First Amendment issue out of hand because Samsung's ad was commercial speech. *Id.* at 1401 & n.3. So what? Commercial speech may be less protected by the First Amendment than noncommercial speech, but less protected means protected nonetheless. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n,* 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). And there are very good reasons for this. Commercial speech has a profound effect on our culture and our attitudes. Neutral-seeming ads influence people's social and political attitudes, and themselves arouse political controversy. " Where's the Beef?" turned

from an advertising catchphrase into the only really memorable thing about the 1984 presidential campaign. Four years later, Michael Dukakis called George Bush "the Joe Isuzu of American politics."

[27] In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between the commercial and noncommercial has not merely blurred; it has disappeared. Is the Samsung parody any different from a parody on Saturday Night Live or in Spy Magazine? Both are equally profit-motivated. Both use a celebrity's identity to sell things - one to sell VCRs, the other to sell advertising. Both mock their subjects. Both try to make people laugh. Both add something, perhaps something worthwhile and memorable, perhaps not, to our culture. Both are things that the people being portrayed might dearly want to suppress.

[28] Commercial speech is a significant, valuable part of our national discourse. The Supreme Court has recognized as much, and has insisted that lower courts carefully scrutinize commercial speech restrictions, but the panel totally fails to do this. The panel majority doesn't even purport to apply the *Central Hudson* test, which the Supreme Court devised specifically for determining whether a commercial speech restriction is valid. The majority doesn't ask, as *Central Hudson* requires, whether the speech restriction is justified by a substantial state interest. It doesn't ask whether the restriction directly advances the interest. It doesn't ask whether the restriction is narrowly tailored to the interest. *See id.* at 566. These are all things the Supreme Court told us - in no uncertain terms - we must consider; the majority opinion doesn't even mention them.

[29] Process matters. The Supreme Court didn't set out the *Central Hudson* test for its health. It devised the test because it saw lower courts were giving the First Amendment short shrift when confronted with commercial speech. *See Central Hudson,* 447 U.S. at 561-62, 567-68. The *Central Hudson* test was an attempt to constrain lower courts' discretion, to focus judges' thinking on the important issues - how strong the state interest is, how broad the regulation is, whether a narrower regulation would work just as well. If the Court wanted to leave these matters to judges' gut feelings, to nifty lines about "the difference between fun and profit," 971 F.2d at 1401, it could have done so with much less effort.

[30] Maybe applying the test would have convinced the majority to change its mind; maybe going through the factors would have shown that its rule was too broad, or the reasons for protecting White's "identity" too tenuous. Maybe not. But we shouldn't thumb our nose at the Supreme Court by just refusing to apply its test.

VII

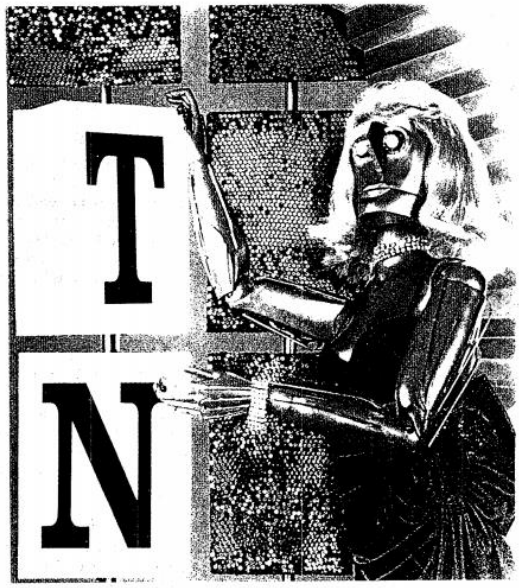
[31] For better or worse, we are the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law we make, and much of their livelihood is made possible by the existence of intellectual property rights. But much of their livelihood - and much of the vibrancy of our culture - also depends on the existence of other intangible rights: The right to draw ideas

from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time.

[32] In the name of avoiding the "evisceration" of a celebrity's rights in her image, the majority diminishes the rights of copyright holders and the public at large. In the name of fostering creativity, the majority suppresses it. Vanna White and those like her have been given something they never had before, and they've been given it at our expense. I cannot agree.

Appendix

Vanna White



Ms. C3PO?