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Using Public Domain Content in New Media

IN A WORLD OF CONVERGING MEDIA, many technology and new media companies are looking for inexpensive quality content to entice users and advertisers to their platforms. User-generated content (UGC), which is developed and shared by individual end-users on platforms such as YouTube, Facebook, MySpace, and Flickr, is one example. But while UGC has proven to be a hit with consumers, advertisers have been less receptive because of the branding risks associated with content that is difficult to monitor and control.¹ A viable business strategy for UGC advertising will likely develop, but advertisers—still the primary source for distributor revenue—continue to be more comfortable with tried and true, professionally produced content.²

An alternative and less expensive content source, to which advertisers may be more receptive, is “classic” content that resides in the public domain. This content is free of license fees due to copyright owners and therefore cheaper to exhibit on new media platforms.

Special care is required, however, because determining that a particular work is in the public domain can be challenging. Also, the use of public domain content is not completely free of risk. The incorporation of marks or other copyrights in a public domain work as well as rights of privacy and publicity can result in a minefield of issues to navigate.

Every day more classic programs enter the public domain in the United States. The threshold issue that must be resolved before using this content is ascertaining whether a work is truly in the public domain. As U.S. copyright law has evolved, the determination of whether a work has fallen into the public domain is not as straightforward as practitioners would hope. Currently, the two main determinants are when the work was first published,³ and if the publication was accompanied by proper notice of copyright.⁴ Except for sound recordings, the chart on page 12 provides a general guide to the public domain status of a copyrightable media work.⁵

The categories in the chart are not mere academic or theoretical distinctions. For example, the 1922 silent film *Robin Hood*, which cost over \$1 million to make (a record sum in its day) and starred Douglas Fairbanks and Enid Bennett, is an example of a pre-1923 movie that is now in the public domain. The Abbott and Costello film *Africa Screams* was first released in 1949 but is now in the public domain due to an apparent failure to renew its copyright. Generally any work created by the government will be in the public domain.⁶

Copyrights in sound recordings are treated differently. The Copyright Act of 1909 did not originally protect sound recordings, although Congress rectified this oversight by later legislation. Sound recordings published before February 15, 1972, receive available state or common law protections but not federal copyright protection.⁷ In California, these sound recordings enjoy copyright protection until February 15, 2047.⁸ The chart on page 13 provides a general guide to the status of sound recordings that were published

before and after the federal government extended protection.

Clearing rights to perform sound recordings publicly is generally facilitated through performance rights organizations (PROs) such as ASCAP, BMI, and SESAC. Obtaining the necessary rights to exhibit programming that incorporates a sound recording can be accomplished by paying the appropriate fees to the PRO administering the recording at issue.

If a work or an element of the work is subject to copyright, a license is generally required for its exploitation. Other additional fees also may be required, such as a license to any music included in the work

The public domain work may be based on or incorporate other creative works that may still be protected by copyright.

and still subject to copyright. Tracking down the owners of a copyrighted work and other rights holders can be a time-consuming process. A dedicated rights clearance agency that specializes in obtaining appropriate licenses can be an important resource.

In some instances, however, it may not be possible to locate the author of a copyrighted work, due to the passage of time, poor record keeping, or changes in ownership. Works whose copyright owners are difficult to find are known as “orphaned works.” Google’s current attempt to locate the authors of books it is trying to incorporate into its Google Book Search provides an illuminating example of the challenges involved in finding the copyright owners of orphaned works.⁹

Google announced that it was creating Google Book Search to enable users to “search through all of the world’s books”¹⁰ by scanning and making them available online. In response, some publishers and authors filed a class action lawsuit against Google, claiming that Google Book Search was a willful infringement of their copyrights. Although Google argued that its actions were covered by the “fair use” exception, it nevertheless agreed recently to settle the lawsuit.¹¹ As with any other class action settlement, Google must provide reasonable notice of the proposed settlement to members of the class, which is composed of persons with a U.S. copyright interest in a book or part thereof that is not in the U.S. public domain.¹²

However, many of the books that Google seeks to digitize are out-of-print orphaned works, and locating their copyright owners is a difficult undertaking. In attempting to provide notice to these owners, Google is effectively engaging in what possibly may be the largest effort

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ever to locate the copyright owners of orphaned works. Google is spending \$8 million in this effort, mostly by placing advertisements in periodicals in almost every country on Earth.¹³

It is doubtful that many potential users will be willing to spend that much money tracking down the owner of an orphaned work. While several proposals have been put forward to deal with orphaned works, no legislation has been enacted yet to fully address the issue.¹⁴ Consequently, using an orphaned work carries the same risk of liability for copyright infringement as any other work that is not in the public domain.

Clearing Intellectual Property Rights

Even if a work is clearly in the public domain, those seeking to use the work should take special precautions regarding 1) any subsequent creative modifications or additional creative elements that may remain subject to copyright protection, 2) whether use of the work may result in federal or state trademark violations, including unfair competition claims, and 3) whether the contemplated use of the work may violate any individual's rights of privacy or publicity.

If a public domain work is restored, modified, augmented, or otherwise edited in any way, the revised version of the work may be protected under a new copyright.¹⁵ Thus, for example, while the original versions of *Africa Screams* and *Robin Hood* are in the public domain, subsequent versions that colorize the film, add new music, or clean up the original images may be subject to copyright protections.

Also, the public domain work may be based on or incorporate other creative works that may still be protected by copyright. For example, if a public domain film is based on a copyrighted novel, only the portions of the film that do not rely on or incorporate the novel may be used without risk of infringement. Similarly, if the music accompanying a program is still copyrighted, playing the music may infringe the copyright. While a film soundtrack enjoys the same copyright protection as the film itself and will enter the public domain at the same time as the film, a musical work or sound recording included in the soundtrack that enjoys independent copyright protection will not enter the public domain simply because the soundtrack enters the public domain.¹⁶

*Stewart v. Abend*¹⁷ provides an instructive example of how the distribution of a derivative work, despite being created under license from the author of the underlying work, was found to be infringing. The derivative film at issue was Alfred Hitchcock's *Rear Window*, which was based on the short story "It Had to Be Murder" by Cornell Woolrich. Although Hitchcock and James Stewart properly obtained the movie rights to the story and a contractual promise from Woolrich to grant them the rights in the renewal term, Woolrich passed away before he could renew the copyright. The right to renew the copyright to the story passed to his estate, which renewed and assigned it to a third party, Sheldon Abend. Abend sued to enjoin the continued distribution of *Rear Window* during the renewal copyright term.

According to the U.S. Supreme Court, although the producers of *Rear Window* had obtained the movie rights to the story for its initial registration term, they did not have equivalent rights to the story during its renewal term and were therefore infringing on the rights owned by Abend.¹⁸ Although *Rear Window* was not in the public domain, that status would not have significantly altered the Court's analysis and final ruling.¹⁹ Therefore, before using any public domain content, a user must be careful to conduct due diligence on elements of the film that may still be protected by copyright.²⁰

Even if copyright issues are not implicated by use of a public domain work, new concerns may arise if the work in question incorporates any trademarks, or if the work itself sufficiently resembles a trademark. In either case, the potential user must consider whether its contemplated use "in connection with the sale, offering for sale, distribution, or advertising of any goods or services...is likely to cause confusion, or to cause mistake, or to deceive"²¹—or if the use would dilute the goodwill created by a trademark owner's investment in a famous mark.²² If this is a possibility, the potential user should consider seeking the trademark owner's approval. Consider, for example, Disney's earliest films featuring Mickey Mouse. Even after these films enter the public domain, the trademarked character of Mickey Mouse could still be protected and might prevent the free use of films that would otherwise be in the public domain.²³

Nonetheless, the U.S. Supreme Court's ruling in *Dastar Corporation v. Twentieth Century Fox Film Corporation*²⁴ greatly restricted the trademark claim of "reverse passing off"—when a person represents someone else's work as his or her own—regarding works in the public domain, although a claim of false advertising may still be viable. *Dastar* took a set of video programs in the public

Public Domain Status of a Work, Based on Time of Publication and Inclusion of Proper Notice				
Up to 1923	1923-1963	1964-1977	1978-March 1, 1989	March 1, 1989, to 2009
Public domain, regardless of proper notice ¹	Published without proper notice ²		Published without proper notice and omission not excused by statute ³	Not in the public domain ⁴
	Published with proper notice and not renewed ⁵	Published with proper notice ⁶		
	Published with proper notice and renewed ⁷			
In the public domain		Not yet in the public domain		

¹ Prior to the Copyright Act of 1909, a copyright term lasted for 14 years, with an additional 14-year renewal term. The 1909 act created an initial 28-year term of copyright, with an additional 28-year renewal term. 17 U.S.C. §24.

² The 1909 act's penalty for failure to comply with notice requirements was harsh: absolute loss of copyright protection. See 17 U.S.C. §10, 37 C.F.R. §202.2 (2008).

³ Until the passage of the Berne Convention Implementation Act of 1988, the same severe penalties for failure to include proper notice applied. 17 U.S.C. §405 provides certain circumstances under which an omission or failure to comply with the notice requirements would not forfeit copyright for the work.

⁴ The 1976 act initially provided that works created after January 1, 1978, would be copyrighted for the life of the author plus 50 years, until the Sonny Bono Copyright Term Extension Act further extended copyright protection by another 20 years in 1998. 17 U.S.C. §302.

⁵ If a work's copyright was not renewed, it would enter the public domain 28 years after publication. 17 U.S.C. §24.

⁶ 17 U.S.C. §304.

⁷ *Id.*

domain, based on General Dwight D. Eisenhower's book chronicling his European campaign in World War II, and edited them slightly, including replacing the original credits and removing references to Eisenhower's still-copyrighted book. The owners of the film rights to the book and the expired copyright on the original video programs sued Dastar for, among other things, reverse passing off by presenting the video programs as a Dastar production.²⁵

The Supreme Court held that Dastar's actions did not constitute reverse passing off under federal trademark law because the video programs were in the public domain and therefore could be freely exploited by anyone. To hold otherwise would be to "create[] a species of perpetual patent and copyright, which Congress may not do."²⁶ The Court did, however, leave open the possibility that Dastar might be liable under other provisions of federal trademark law that prohibit false advertising, such as misrepresenting the nature or qualities of the advertised work.²⁷ In light of the *Dastar* holding and the continued viability of some trademark claims, those seeking to use a public domain work should consider the prospect of liability for trademark infringement or related state unfair competition claims.

Personal Right to Privacy

Even if all intellectual property rights are cleared regarding a work in the public domain, potential users of the work should examine whether the work implicates personal rights of privacy and publicity, which are governed by state law. U.S. courts have long recognized a personal right to privacy, and states have increasingly recognized a personal right of publicity as well.²⁸ The violation of a person's right to privacy gives rise to a common law tort claim, unless the claim has been preempted by statute. In California, there are four recognized torts related to the invasion of privacy: intrusion, public disclosure of private facts, false light, and misappropriation.²⁹ Furthermore, the right to privacy is also guaranteed by the California Constitution, even against private entities.³⁰ For the purpose of clearing rights, the most likely context in which privacy tort claims might arise would be the unauthorized taping of a person or portrayals of an individual that are injurious to that individual's reputation.

The first category, unauthorized taping, potentially triggers tort claims for intrusion of privacy and for public disclosure of private facts. Intrusion of privacy requires an "intrusion into a private place, conversation, or matter" in which the plaintiff had an objectively reasonable expectation of privacy. Further, the intrusion must take place "in a

manner highly offensive to a reasonable person."³¹ The tort of public disclosure of private facts gives an individual a cause of action for a public disclosure of private facts that a reasonable person would consider offensive and objectionable and that does not constitute a matter of legitimate public concern.³²

The first case in California to recognize the public disclosure of private facts as a tort involved the film adaptation of a true story that brought the plaintiff's past to public attention. In *Melvin v. Reid*, more commonly known as the Red Kimono case,³³ the defendants produced a film based on the life story of the plaintiff, Gabrielle Darley. Darley had been a prostitute who was charged with but ultimately acquitted of murder. After the acquittal she left prostitution, married, and was living, in the words of the court, "an exemplary, virtuous, honorable and righteous life...."³⁴ Without Darley's permission, the defendants produced a movie based on her life story and used her real name. As a result, Darley's reputation and standing in her community plummeted, and she brought suit. Although California had not previously recognized a right to privacy, the court nonetheless found that publishing the facts of Darley's life and using her name were tortious "invasion[s] of her inalienable right...to pursue and obtain happiness."³⁵ Since the Red Kimono case, California's courts have more clearly affirmed that the public disclosure of private facts is a species of the invasion of privacy tort,³⁶ which should be considered independent of copyright issues when evaluating the potential use of a work.

Prior publication may serve as a defense to a claim for public disclosure of private facts, on the basis that it has made the facts a matter of public knowledge.³⁷ This is clearly the case when the previous publication was in official court records, as in *Gates v. Discovery Communications, Inc.*³⁸ The court held that "an invasion of privacy claim based on...[the] defendant's publication of facts



obtained from public official records of a criminal proceeding is barred by the First Amendment to the United States Constitution."³⁹ *Gates* left open the possibility, however, that previous publication in a medium other than official court records would not bar a claim for invasion of privacy.⁴⁰ Although *Gates* clarified the scope of the prior publication defense, absent a ruling that prima facie applies beyond public court records, a prior publication defense may be limited and should not be relied upon without careful consideration of the specific facts presented.

The second category of privacy torts, portrayal of an individual in a manner injurious to the person's reputation, includes false light and misappropriation torts. The instances in which these portrayals could arise include advertising—for example, creating the appearance that an individual is endorsing a product—or depictions of real individuals that are factually false and objectionable. False light torts are widely considered to be similar to torts for defamation,⁴¹ and misappropriation torts are considered similar to violations of an individual's right of publicity.⁴²

The first California case to recognize a false light tort was *Gill v. Curtis Publishing Company*,⁴³ in which the plaintiffs sued the defendant for publishing their photo with a caption that implied they were "loose, dissolute and immoral persons."⁴⁴ Courts in California have subsequently reaffirmed this tort, which requires a public disclosure that portrays the plaintiff in a reasonably objectionable false light—for example a false endorsement⁴⁵ or attributing false statements to the plaintiff.⁴⁶

Right of Publicity

In general, the use of another person's name, voice, signature, photograph, or likeness for commercial advantage gives rise to a claim for damages and potentially injunctive relief under either common law or statute.⁴⁷ In contrast to

Public Domain Status of a Sound Recording			
Published before February 15, 1972	Published between February 15, 1972, through 1977	Published between 1978 through March 1, 1989	March 1, 1989, to 2009
Protected by any available state or common law copyright—in California, copyright protection lasts until February 15, 2047	Without proper notice of copyright	Without proper notice of copyright	Not in the public domain
	With proper notice	With proper notice	
 In the public domain		 Not yet in the public domain	

a misappropriation tort, in California a claim under the statutory right of publicity requires that the use be in direct connection with advertising or sales.⁴⁸ In certain instances, a statutory right of publicity claim may be preempted by federal copyright law. Preemption occurs when “the subject of the claim [is]...a work fixed in a tangible medium of expression [that]...comes within the subject matter or scope of copyright protection” and “the right asserted [is]...equivalent to the exclusive rights” provided by federal copyright law.⁴⁹ If a plaintiff attempts to circumvent copyright law by using a right of publicity claim, copyright preemption should be relatively uncontroversial, as demonstrated by *Fleet v. CBS, Inc.*⁵⁰ and *Laws v. Sony Music Entertainment, Inc.*⁵¹

In *Fleet*, the plaintiffs were two actors who sued the defendant for violating their right of publicity by reproducing and distributing a film in which they had acted without compensation. The court found that the subjects of the claims were the plaintiffs’ dramatic performances in the film at issue, and these performances were copyrighted works once they were fixed in a tangible medium of expression.⁵² Despite the plaintiffs’ framing their claims as violations of their right to publicity, “if all they are seeking is to prevent a party from exhibiting a copyrighted work they are making a claim ‘equivalent to an exclusive right within the general scope of copyright.’”⁵³

In *Laws*, the plaintiff sued the defendant for sampling a portion of her song “Very Special” for use in Jennifer Lopez’s hit song “All I Have.” The court found that the subject matter of the claim, a musical sound recording, was a copyrighted work, exclusively controlled by copyright law.⁵⁴ In *Fleet* and *Laws*, federal copyright preemption prevented the plaintiffs from successfully asserting their right of publicity claims.

But not all claims for violation of a right of publicity are preempted by copyright law. For example, in *KNB Enterprises v. Matthews*,⁵⁵ a number of models had assigned their right of publicity claims to the plaintiff, the owner of copyrighted erotic photographs of the models. The defendant subsequently published the photographs without permission and the plaintiff sued for violation of the assigned rights of publicity. The court found that although the plaintiff was bringing a separate claim for copyright infringement, the right of publicity claims were not equivalent to claims of copyright infringement and therefore were not preempted by federal copyright law.⁵⁶

The preemption of right of publicity claims by federal copyright law is an area of law that remains “volatile.”⁵⁷ Whether or not a right of publicity claim will be preempted depends on the specific facts of the case.⁵⁸ Also, it

has been suggested that once a copyrighted work enters the public domain, state law cannot further constrain its free and unfettered use by allowing right of publicity claims to proceed.⁵⁹ Even so, right of publicity concerns surrounding works in the public domain have not disappeared, as illustrated by *Prima v. Darden Restaurants*.⁶⁰

In *Prima*, the defendant hired a singer with a voice similar to the plaintiff’s deceased husband, singer Louis Prima, to sing his hit song “Oh Marie,” which was in the public domain, in an advertisement for the restaurant chain Olive Garden. The plaintiff sued for violation of Prima’s right of publicity, which was descendible under the applicable New Jersey state law (similar to California’s Civil Code Section 3344.1). The defendant attempted to argue that the right of publicity claims were preempted by copyright law, an argument that the court dismissed by pointing out that the subject of the right of publicity claim was not the song itself but the impersonation of Prima’s voice, which was not copyrightable. *Prima* serves as a warning that the use of a public domain work may not always be bereft of right of publicity concerns.

In California, under Section 3344.1 the right of publicity survives a person’s death and will pass to the person’s heirs. The statute does provide an exemption for a use occurring in “a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works...if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.”⁶¹ However, the section makes it clear that this exemption does not permit a deceased individual’s likeness to be used for “advertising, selling, or soliciting purchases” of a good or service.⁶²

While classic works in the public domain may be a source of relatively cheap quality content for new media distribution and may be more palatable to advertisers, clearing rights to use the content involves more than simply verifying its status in the public domain. Users must ensure that their contemplated exploitation does not give rise to other copyright claims or claims outside of the context of copyright, including trademark, right of privacy, or right of publicity. ■

¹ *Cf. Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 118 (E.D. N.Y. 1972) (finding trademark infringement when defendant adapted Coca-Cola trademark and advertising slogan “Enjoy Coca-Cola” and substituted “ine” for “-Cola”).

² *See, e.g., Hulu Who?*, THE ECONOMIST, Feb. 5, 2009 (“[F]or the moment it appears that YouTube proved that people would watch videos online—whereas Hulu is proving that advertisers will foot the bill.”).

³ “Publication” is an important term in copyright law,

particularly for works published prior to 1978. For additional discussion on this issue, *see, e.g.,* MARSHALL LEAFER, UNDERSTANDING COPYRIGHT LAW §4.03 (2005).
⁴ All works created after passage of the Copyright Act of 1976 enjoy protection from the moment of creation, not publication, and failure to include adequate notice no longer places a work into the public domain.
⁵ This does not include mask works, hull designs, or unpublished works, nor does it apply to works first published outside the United States.

⁶ 17 U.S.C. §105.

⁷ 17 U.S.C. §301(c).

⁸ CIV. CODE §980.

⁹ *See* Noam Cohen, *A Google Search of a Distinctly Retro Kind*, N.Y. TIMES, Mar. 4, 2009, available at <http://www.nytimes.com/2009/03/04/books/04google.html> (last visited Mar. 5, 2009). *See also* Jake Mooney, *A Look Back at Canarsie, Clouded by Copyright Woes*, N.Y. TIMES, June 29, 2008, available at <http://www.nytimes.com/2008/06/29/nyregion/thecity/29hist.html> (last visited Mar. 5, 2009).

¹⁰ Google, About Google Book Search, <http://books.google.com/googlebooks/history.html> (last visited Mar. 6, 2009).

¹¹ For the full terms of the settlement, *see* <http://www.googlebooksettlement.com/r/home> (last visited Mar. 6, 2009).

¹² *Id.*

¹³ *See* Cohen, *supra* note 9.

¹⁴ *See, e.g.,* U.S. Copyright Office, Orphan Works, at <http://www.copyright.gov/orphan/> (last visited Feb. 23, 2009).

¹⁵ To qualify for independent protection as a derivative work, the new version must “represent an original work of authorship.” 17 U.S.C. §101. The Copyright Office has held that “colorizing” a black-and-white work may be sufficient to qualify for copyright protection. 37 C.F.R. §202 (2008).

¹⁶ 17 U.S.C. §101. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §2.09(E) (2008); *see also* Maljack Prods., Inc. v. Goodtimes Home Video Corp., 81 F. 3d 881, 886 (9th Cir. 1996) (finding that when music in a film was copyrighted separately from the film, the producer’s “use of the music in the motion picture did not give [the producer] any right to the music copyrights”); *Stewart v. Abend*, 495 U.S. 207, 223 (1990).

¹⁷ *Stewart*, 495 U.S. 207.

¹⁸ *Id.* at 235-36.

¹⁹ *See, e.g.,* *Russell v. Price*, 612 F. 2d 1123 (9th Cir. 1979) (When a film based on a still-copyrighted play enters into the public domain, only those elements of the film that are not based upon the underlying play can be exploited.).

²⁰ *See id.*

²¹ 15 U.S.C. §1114(1)(a). For common law marks, *see* 15 U.S.C. §1125(a)(1)(A).

²² 15 U.S.C. §1125(c)(1).

²³ *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §2.12 (2008).

²⁴ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

²⁵ The owners of the copyright in Eisenhower’s book also sued *Dastar* for infringement of their copyright in the book, a claim on which they ultimately prevailed. *See Twentieth Century Fox Film Corp. v. Entertainment Distrib.*, 429 F. 3d 869 (9th Cir. 2005).

²⁶ *Dastar*, 539 U.S. 23.

²⁷ 15 U.S.C. §1125(a)(1)(B).

²⁸ According to a 2006-2007 50-state survey, 15 states statutorily recognize an individual right of publicity. MEDIA LAW RESOURCE CENTER, INC., MEDIA PRIVACY AND RELATED LAW 2006-2007 1648-51 (2006).

²⁹ WILL GLENNON, CALIFORNIA TORTS §46.01(2)(b) (2008).

³⁰ *Hill v. National Collegiate Athletic Ass’n*, 7 Cal. 4th

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³¹ See *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200 (1998).

³² *Id.*

³³ *Melvin v. Reid*, 112 Cal. App. 285 (1931); see also MEDIA LAW RESOURCE CENTER, INC., *supra* note 28, at 353.

³⁴ *Melvin*, 112 Cal. App. at 286.

³⁵ *Id.* at 292.

³⁶ See, e.g., *Coverstone v. Davies*, 38 Cal. 2d 315 (1952).

³⁷ See, e.g., *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040, 1047 (1984) (finding no tort when the plaintiff's homosexuality was already public knowledge via various means, including publication in different periodicals).

³⁸ *Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679 (2004).

³⁹ *Id.* at 696.

⁴⁰ *Id.* at n.7 (distinguishing a case based, in part, on the fact that the alleged defamation was published in a book, not official court records).

⁴¹ *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal. 3d 529, 543 (1971).

⁴² See *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (1979).

⁴³ *Gill v. Curtis Publ'g Co.*, 38 Cal. 2d 273 (1952).

⁴⁴ *Id.* at 275. See also MEDIA LAW RESOURCE CENTER, INC., *supra* note 28, at 349.

⁴⁵ *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207 (1942).

⁴⁶ *Kinsey v. Macur*, 107 Cal. App. 3d 265 (1980).

⁴⁷ *Eastwood v. Superior Court*, 149 Cal. App. 3d 409 (1983); CIV. CODE §§3344, 3344.1. See also SB 771, which amends and expands California's posthumous rights of publicity; and Thomas F. Zuber, *Everlasting Fame*, LOS ANGELES LAWYER, May 2009, at 28.

⁴⁸ *Id.* See also MEDIA LAW RESOURCE CENTER, INC., *supra* note 28, at 372.

⁴⁹ *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1919 (1996). See also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §1.01 (2008).

⁵⁰ *Fleet*, 50 Cal. App. 4th 1911.

⁵¹ *Laws v. Sony Music Entm't, Inc.*, 448 F. 3d 1134 (9th Cir. 2006).

⁵² *Fleet*, 50 Cal. App. 4th at 1919.

⁵³ *Id.* at 1920.

⁵⁴ *Laws*, 448 F. 3d 1134.

⁵⁵ *KNB Enters. v. Matthews*, 78 Cal. App. 4th 362 (2000).

⁵⁶ *Id.* at 374.

⁵⁷ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §1.01(B)(3)(b) (2008).

⁵⁸ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §1.01(B)(3)(b)(iv)(I) (2008):

[The divergent holdings in these cases can be reconciled by] drawing a line between entertainment works used for their own sake and commercial works used for advertising purposes....A song can be on the right side if used to express Jennifer Lopez' artistic vision, but on the wrong if it hawks Cheetos and Cherokees. A photo of June Toney falls on the right side if for museum display, on the wrong side if used to adorn a shampoo bottle. A film is protected if it has two hours of entertainment, teaches how to dance, or recaptures the saga of 1960's radicalism, but on the wrong side if it just glorifies a computer game that the NFL wants to sell.

⁵⁹ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §1.01, at n.227 (2008).

⁶⁰ *Prima v. Darden Restaurants*, 78 F. Supp. 2d 337 (D. N.J. 2000).

⁶¹ CIV. CODE §3344.1(a)(2).

⁶² CIV. CODE §3344.1(a)(3).