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## Musicians, Politicians, and the Forgotten Tort

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# Musicians, Politicians, and the Forgotten Tort\*

Arlen W. Langvardt

## Abstract

Election seasons regularly reveal uses of songs and recordings at campaign events and in campaign ads. Frequently, well-known performers who have recorded the songs object to the uses of the songs and recordings (and their recognizable voices). Often, the performers do not own the copyright to the songs or the recordings, so they have no copyright infringement claim to bring. Performers who seek legal relief against those responsible for the political uses have relied, thus far, on right of publicity claims or false endorsement claims under section 43(a) of the Lanham Act. However, judicial concerns about the proper reach and application of those theories, and uncertainties about how to account for First Amendment interests, make the right of publicity and false endorsement less-than-reliable theories for performers to invoke against political users. This Article proposes the use of a different theory in this setting: the forgotten tort of false light publicity. It is well established that this theory—one that performers have yet to invoke and commentators have not addressed—may be employed in response to defendants' noncommercial speech, assuming the relevant First Amendment requirements are met. The First Amendment aspects of false light publicity were set long ago by the Supreme Court. For courts, the false light publicity theory has the virtues of setting the governing rules relatively clearly and avoiding the uncertainties presented by the theories that performers have employed thus far against political users. Some performers' claims should succeed under false light publicity principles, and others should not. At least, however, the false light publicity theory offers reasonable ways to balance the competing expressive interests of performers and political candidates.

**KEYWORDS:** Musicians, Politicians, Tort, Right of Publicity, False Light

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*This Article proposes the use of a different theory in this setting: the forgotten tort of false light publicity. It is well established that this theory—one that performers have yet to invoke and commentators have not addressed—may be employed in response to defendants' noncommercial speech, assuming the relevant First Amendment requirements are met. The First Amendment aspects of false light publicity were set long ago by the Supreme Court. For courts, the false light publicity theory has the virtues of setting the governing rules relatively clearly and avoiding the uncertainties presented by the theories that performers have employed thus far against political users. Some performers' claims should succeed under false light publicity principles, and others should not. At least, however, the false light publicity theory offers reasonable ways to balance the competing expressive interests of performers and political candidates.*

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## INTRODUCTION

It happens multiple times during every election season. At campaign rallies or in televised political advertisements (“ads”),

candidates for office and groups supporting them use songs and recordings whose copyrights belong to other individuals or organizations. Sometimes the use of the music seems designed to set a certain tone or create enthusiasm at a campaign event; in other instances, musically reinforcing a visual or textual message to would-be voters serves as the apparent purpose.

Early in the 2016 presidential primary season, for example, Donald Trump's campaign used Adele's recording of *Rolling in the Deep*<sup>1</sup> and two older, but still familiar, recordings: Neil Young's *Rockin' in the Free World* and Aerosmith's *Dream On*.<sup>2</sup> Adele, Young, and Steven Tyler (of Aerosmith) were not flattered. All three insisted that the Trump campaign cease using the musical works.<sup>3</sup> Later, Mick Jagger and his Rolling Stones bandmates joined the complaining chorus with a demand that the Trump campaign cease using their recording of *Start Me Up*.<sup>4</sup> During the general election race, the Trump campaign again opted to use a

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<sup>1</sup> Andrew Flanagan, *Adele Tells Trump, and Every Other Politician, to Back Off*, BILLBOARD (Feb. 1, 2016), <http://www.billboard.com/articles/business/6859534/adele-trump-rolling-in-the-deep-political-campaign> [<http://perma.cc/F2FU-P3GL>]; Ted Johnson, *Adele Objects to Use of Her Music at Donald Trump, Other Campaign Rallies*, VARIETY (Feb. 1, 2016, 12:28 PM) <http://variety.com/2016/music/news/donald-trump-adele-music-rallies-1201693891/> [<http://perma.cc/4ETS-8WEV>]. In addition, Adele objected to the Trump campaign's use of her recording of *Skyfall*. See Johnson, *supra*. Primary-season candidates Chris Christie and Mike Huckabee also made use of songs recorded by Adele. Flanagan, *supra*.

<sup>2</sup> Ben Sisario, *In Choreographed Campaigns, Candidates Stumble Over Choice of Music*, N.Y. TIMES (Oct. 12, 2015), <http://www.nytimes.com/2015/10/13/us/politics/in-choreographed-campaigns-candidates-stumble-over-choice-of-music.html> [<http://perma.cc/FT5Q-4XM5>].

<sup>3</sup> Flanagan, *supra* note 1; Sisario, *supra* note 2.

<sup>4</sup> Jenny Starrs, *5 Artists Who Told Trump to Stop Using Their Music*, WASH. POST (May 5, 2016, 4:26 AM), [https://www.washingtonpost.com/video/politics/5-artists-who-told-trump-to-stop-using-their-music/2016/05/05/d8dc3926-129b-11e6-a9b5-bf703a5a7191\\_video.html](https://www.washingtonpost.com/video/politics/5-artists-who-told-trump-to-stop-using-their-music/2016/05/05/d8dc3926-129b-11e6-a9b5-bf703a5a7191_video.html) [<http://perma.cc/U7E8-3MHU>]. Perhaps surprisingly, given candidate Trump's practice of assigning nicknames to rival candidates, the Trump campaign did not take advantage of what might have been golden political musical opportunities. For instance, if the Trump campaign had run an ad critical of "low-energy" Jeb Bush, *Take It Easy* (song by Jackson Browne and hit recording by the Eagles) would have been a desirable choice. Similarly, it is surprising that the Trump campaign did not target "Lyin' Ted" Cruz with an ad that used *Lyin' Eyes* (the Eagles again). These less-than-serious examples aside, copyright owners and performers of well-known recordings do not find it a laughing matter when their creative works and efforts are borrowed for political purposes. See Sisario, *supra* note 2.

Stones recording, *You Can't Always Get What You Want*, at a campaign event.<sup>5</sup> Queen's recording of *We Are the Champions* played in the background as nominee Trump was introduced at the Republican National Convention—much to the chagrin of the surviving members of the musical group.<sup>6</sup>

During the 2012 presidential primary season, Tom Petty (of Tom Petty and the Heartbreakers) objected when Michele Bachmann's campaign used the group's recording of *American Girl*.<sup>7</sup> Four years earlier, the campaigns of both presidential candidates in the general election drew similar objections. Barack Obama's campaign ceased using the recording of *Hold On, I'm Comin'* at rallies after musical artists Sam & Dave complained.<sup>8</sup> Singer-songwriter Jackson Browne sued John McCain's campaign and the Republican National Committee ("RNC") over the campaign's use of his recording *Running on Empty* in a McCain ad.<sup>9</sup> In addition to these, there are many other examples of similar objection-triggering uses of musical works.<sup>10</sup>

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<sup>5</sup> Jenna Johnson & Robert Costa, *In Announcing Mike Pence, Donald Trump Talks Mostly About Himself*, WASH. POST (July 16, 2016), [https://www.washingtonpost.com/politics/in-announcing-mike-pence-donald-trump-talks-mostly-about-himself/2016/07/16/655eb2f4-4b75-11e6-90a8-fb84201e0645\\_story.html](https://www.washingtonpost.com/politics/in-announcing-mike-pence-donald-trump-talks-mostly-about-himself/2016/07/16/655eb2f4-4b75-11e6-90a8-fb84201e0645_story.html) [<http://perma.cc/6YM7-22YZ>].

<sup>6</sup> Mercy Yang, *Queen Has No Time for Losers Like Donald Trump and the RNC*, HUFFINGTON POST (July 19, 2016, 1:33 PM), [http://www.huffingtonpost.com/entry/donald-trump-queen\\_us\\_578e46e6e4b0a0ae97c37e8b](http://www.huffingtonpost.com/entry/donald-trump-queen_us_578e46e6e4b0a0ae97c37e8b) [<http://perma.cc/U49M-L4G4>]. In addition, George Harrison's estate complained about the use of *Here Comes the Sun* when Ivanka Trump was introduced at the convention. Will Drabold, *Now the Beatles Are Angry With Donald Trump For Using Their Music*, TIME (July 22, 2016), <http://time.com/4418897/now-the-beatles-are-angry-with-donald-trump-for-using-their-music/?xid+msn> [<http://perma.cc/NK25-S875>].

<sup>7</sup> Jana Moser, *Songs in Contention: Copyright Holders Have Begun to Challenge the Customary Appropriation of Songs for Political Campaigns*, L.A. LAW., May 2013, at 28, 29.

<sup>8</sup> Sarah Schacter, Note, *The Barracuda Lacuna: Music, Political Campaigns, and the First Amendment*, 99 GEO. L.J. 571, 579 (2011).

<sup>9</sup> Browne's case will receive extensive attention later in the Article. See *infra* text accompanying notes 67–167, 211–57. The McCain campaign also drew objections from Ann and Nancy Wilson, who comprised the musical duo Heart. They complained when their hit song and recording *Barracuda* was used at a campaign event featuring McCain running mate Sarah Palin. Schacter, *supra* note 8, at 572.

<sup>10</sup> For listings of such examples over the years, see Michelle Lin, *Keep on Rockin' in the Free World: Trademark Remedies for Musicians*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 98, 98–99 (2011); Lauren M. Bilasz, Note, *Copyrights, Campaigns, and Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events*, 32 CARDOZO L. REV. 305, 305–07 (2010); Schacter, *supra* note 8, at 577–79.

Uses of the sort noted above have caused copyright owners (of both the musical composition and the sound recording) to threaten legal action—and sometimes file lawsuits—against the offending candidates, campaign organizations, or supporting groups.<sup>11</sup> These copyright infringement disputes usually focus on whether the use of the musical works occurred pursuant to a blanket license<sup>12</sup> and, if not, whether the defendants should receive the protection of the fair use defense.<sup>13</sup> Importantly, however, copyright owners tend not to be the only dissatisfied parties in the situations described. Rather than addressing copyright issues, this Article focuses on the legal interests of the *other* dissatisfied parties—those who do not necessarily have copyright interests to enforce but feel wronged when political candidates or supporting groups employ music in the manner described.

Identifying those other supposedly wronged parties begins with the recognition that when candidates, campaigns, and super PACs use musical works for political purposes, they count on the public's familiarity with the chosen songs and recordings. Common sense

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<sup>11</sup> See, e.g., *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010); *Browne v. McCain*, 611 F. Supp. 2d 1073 (C.D. Cal. 2009). It is important to note that a musical composition (“song”) is one copyrighted work and the sound recording (“recording”) of the musical composition is a separate copyrighted work. See 17 U.S.C. § 102 (2012); U.S. COPYRIGHT OFFICE, CIRCULAR 56A, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS (2012). The owner of the copyright to the song and the owner of the copyright to the recording may be different parties. See John Tehranian, *Guantanamo’s Greatest Hits: The Semiotics of Sound and the Protection of Performer Rights Under the Lanham Act*, 16 VAND. J. ENT. & TECH. L. 11, 15 (2013).

<sup>12</sup> If the use occurred at a campaign event, chances are that the venue where the event took place obtained a blanket license from a performing rights organization. If so, a copyright infringement claim probably would not be successful. See Tehranian, *supra* note 11, at 14; Bilasz, *supra* note 10, at 308–09; Schacter, *supra* note 8, at 576–77. A use in a campaign advertisement would not be covered by a blanket license. Instead, a direct license from the copyright owner would be necessary to avoid infringement liability (unless, of course, a court held the use to be protected under the fair use doctrine). See Tehranian, *supra* note 11, at 15.

<sup>13</sup> See 17 U.S.C. § 107 (2012). For a discussion of fair use issues in copyright owners' infringement claims against defendants that made political uses of musical works or recordings, see Matthew J. Cursio, Comment, *Born to Be Used in the USA: An Alternative Avenue for Evaluating Politicians' Unauthorized Use of Original Musical Performances on the Campaign Trail*, 18 VILL. SPORTS & ENT. L.J. 317, 323–29, 358–63 (2011), and David C. Johnston, Note, *The Singer Did Not Approve This Message: Analyzing the Unauthorized Use of Copyrighted Music in Political Advertisements in Jackson Browne v. John McCain*, 27 CARDOZO ARTS & ENT. L.J. 687, 691–704 (2010).

suggests that if this familiarity is lacking, the use of the musical works may not achieve the desired effect. The necessary familiarity with a song usually stems from a performer's well-known rendition of it in a recording. When a song and recording are used to advance political objectives, the performer of the well-known rendition may be concerned that the public will think she supports a candidate she does not support or holds a viewpoint she does not hold.<sup>14</sup>

The concerned performer, however, will often have no *copyright* interest to assert regarding the song because she either did not write it or, if she wrote it, she transferred ownership of the relevant copyright to a music publishing firm or other entity.<sup>15</sup> Performers frequently perform or record songs that they did not write.<sup>16</sup> Moreover, many who do fit in the singer-songwriter category end up transferring their copyrights to music publishers.<sup>17</sup> The performer is also unlikely to own the copyright to a recording that features her rendition of a song, because the record label usually owns the recording copyright.<sup>18</sup>

When political campaigns use song renditions without their consent, unhappy performers complain—regardless of whether they have any copyright interest to enforce—about the prospect that the public may erroneously think they support or endorse the political endeavor at issue.<sup>19</sup> Such objections usually do not go beyond a cease and desist letter and the out-of-court reaction to the use—either the political user backs down, or the unresolved spat plays out in the media.<sup>20</sup> The performers who have formally sought legal remedies by filing a lawsuit have invoked two key legal theories of a non-copyright nature. One is the right of publicity, as recognized under the common law or statutes in many states.<sup>21</sup> The

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<sup>14</sup> See Tehranian, *supra* note 11, at 12–15, 18.

<sup>15</sup> 17 U.S.C. § 201(a), (d) (2012).

<sup>16</sup> Ken Consor, *What You Didn't Know About Radio Royalties*, SONGTRUST BLOG (Aug. 6, 2014), <http://blog.songtrust.com/publishing-tips-2/what-you-didnt-know-about-radio-royalties/> [<http://perma.cc/ZL6X-GMMD>].

<sup>17</sup> See, e.g., AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 103–04 (4th ed. 2010).

<sup>18</sup> Tehranian, *supra* note 11, at 15.

<sup>19</sup> See, e.g., *Browne v. McCain*, 611 F. Supp. 2d 1062, 1065 (C.D. Cal. 2009).

<sup>20</sup> See Sisario, *supra* note 2.

<sup>21</sup> See *infra* text accompanying notes 34–65.



other is false endorsement, under section 43(a) of the federal Lanham Act.<sup>22</sup>

In the small number of reported cases, the results have been mixed.<sup>23</sup> Some right of publicity case law suggests that performers may succeed with claims regarding political uses of their musical renditions.<sup>24</sup> Other decisions, however, reveal judicial concerns about whether such uses are sufficiently commercial to satisfy the elements of a right of publicity claim and about whether—and, if so, how—to account for First Amendment interests that may arise in a right of publicity case regarding a political use.<sup>25</sup> Similarly, in section 43(a) cases, courts have offered conflicting signals about whether plaintiffs should have valid claims against defendants engaged in political activities. Some courts have rejected such claims by concluding that the uses at issue were insufficiently commercial to violate the statute, and by otherwise interpreting section 43(a) narrowly. Other courts have concluded that section 43(a) may sometimes reach political uses, but have acknowledged uncertainty about how to account for the First Amendment interests present in such uses.<sup>26</sup>

Commentators have offered proposals for addressing the questions that have troubled courts in right of publicity and false endorsement cases of the sort noted above.<sup>27</sup> As this Article demonstrates, however, there is another possibility: a legal theory that performers have not invoked and commentators have not addressed as a possible cause of action for performers. One may characterize it as the forgotten tort—seemingly overlooked in the performers' rights context and otherwise less frequently invoked today than during what once seemed a heyday in the making.<sup>28</sup>

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<sup>22</sup> See *infra* text accompanying notes 170–209.

<sup>23</sup> The two leading cases are *Browne v. McCain*, 611 F. Supp. 2d 1062 (C.D. Cal. 2009), and *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010). These cases will be examined extensively in Parts I and II.

<sup>24</sup> See *infra* text accompanying notes 46–51.

<sup>25</sup> For discussion of the right of publicity-related disagreements and uncertainties alluded to in this paragraph, see *infra* text accompanying notes 62–65, 114–69.

<sup>26</sup> For discussion of the false endorsement-related disagreements and uncertainties alluded to in this paragraph, see *infra* text accompanying notes 236–95.

<sup>27</sup> See generally Lin, *supra* note 10; Tehranian, *supra* note 11; Schacter, *supra* note 8.

<sup>28</sup> See *infra* text accompanying notes 296–314.

This forgotten tort is *false light publicity*, one of the four types of invasion of privacy identified in William Prosser's influential article published in 1960.<sup>29</sup> Authorities in many states recognize false light publicity as a cause of action,<sup>30</sup> even if other types of invasion of privacy seem to have acquired greater prominence in recent years. This legal cousin of defamation contains common law elements that can be applied to performers' interests in cases of the sort addressed in this Article.<sup>31</sup> Moreover, roughly fifty years ago in *Time, Inc. v. Hill*, the U.S. Supreme Court added First Amendment requirements to false light publicity's common law elements by borrowing constitutional principles from the Court's defamation decisions.<sup>32</sup> The First Amendment requirements outlined in *Hill* provide familiar and sufficient protections for the speech interests potentially at stake in performers' cases against political candidates and political groups.<sup>33</sup> Therefore, the false light publicity theory merits a close look.

The first two Parts of the Article address the two non-copyright theories that performers have invoked when their renditions of songs have been used for political purposes. Specifically, Part I discusses right of publicity cases, and Part II reviews false endorsement claims. Both Parts examine the mixed results and signals in the cases, and consider the First Amendment issues that have troubled courts. Part III furnishes background on the false light publicity variety of invasion of privacy, and explores the Supreme Court's delineation of First Amendment requirements for false light publicity in *Time, Inc. v. Hill*, as well as other relevant decisions. Part IV explains why the false light publicity theory may provide some performers with a basis for relief when their renditions have been used for political purposes without their consent. Part IV explores two notable virtues of the theory. First, because it clearly can be applied to noncommercial uses, false light publicity eliminates the need to wrestle with some of the coverage questions that

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<sup>29</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

<sup>30</sup> Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1901 (2010).

<sup>31</sup> For extensive background on false light publicity, see *infra* text accompanying notes 296–390.

<sup>32</sup> 385 U.S. 374, 387–88, 390–91 (1967).

<sup>33</sup> See *infra* text accompanying notes 359–75.

have vexed courts when performers have sued on right of publicity or false endorsement grounds. Second, because its First Amendment contours have long been established by the Supreme Court, the theory sidesteps the First Amendment uncertainties with which courts have struggled in right of publicity and false endorsement cases. In addition, Part IV comments on key issues that arise under false light publicity's common law and First Amendment aspects when performers bring such claims, and offers recommendations for the proper treatment of those issues.

## I. PERFORMERS' RIGHT OF PUBLICITY CLAIMS AGAINST POLITICAL USERS

### A. *Right of Publicity Background*

As recognized by common law or statutes in most states, the right of publicity rests mainly on the notion that, through the expenditures of time and effort in honing professional talents and skills, a celebrity develops a potentially valuable property right that consists of her name, likeness, and identity.<sup>34</sup> This property right entitles the celebrity to legal relief when another party makes a commercial use of the name, likeness, or identity without the celebrity's consent.<sup>35</sup> Although the right of publicity is also premised on guarding against the public's drawing of an erroneous conclusion that the celebrity endorses the defendant's commercial endeavor, states that recognize the right of publicity typically do not require the plaintiff to prove actual or likely consumer confusion in that regard.<sup>36</sup>

The right of publicity's origins and historical development are well documented and helpfully examined elsewhere.<sup>37</sup> Accordingly,

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<sup>34</sup> See J. THOMAS MCCARTHY ET AL., MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY 529 (3d ed. 2004).

<sup>35</sup> *Id.* at 528–31.

<sup>36</sup> *Id.* at 529. However, the false endorsement theory under section 43(a) of the Lanham Act is different. Proof of likelihood of confusion is required in false endorsement cases. See *infra* text accompanying note 181.

<sup>37</sup> See, e.g., Tara E. Langvardt, *Reinforcing the Commercial-Noncommercial Distinction: A Framework for Accommodating First Amendment Interests in the Right of Publicity*, 13 VA. SPORTS & ENT. L.J. 167, 169–74 (2014).

this Section foregoes much of the discussion of those matters and instead emphasizes issues of particular relevance to the music use context. One such issue deals with the scope of a celebrity's *identity* for right of publicity purposes. Another such issue (or, really, set of issues) concerns the requirement that the defendant's use of the plaintiff's name, likeness, or identity must have been commercial in nature for a violation of the right of publicity to have occurred. The following Section takes up those issues.

As the right of publicity evolved, courts held that it went beyond offering protection against unconsented commercial uses of the celebrity's name or likeness in the sense of an actual photo or video of the plaintiff.<sup>38</sup> Courts stretched the likeness component of the right of publicity to offer the celebrity relief when the defendant made a commercial use of a celebrity look-alike rather than an actual photo or video of the celebrity.<sup>39</sup> Over time, courts also concluded that a celebrity merited right of publicity protection if the defendant's commercial use invoked her public identity, regardless of whether the celebrity's name and likeness were also used.<sup>40</sup> Celebrities' well-known nicknames were held to be aspects of the protected identity, as were phrases associated so strongly with a celebrity that members of the public think of the celebrity when they hear the phrase.<sup>41</sup>

*White v. Samsung Electronics America, Inc.* expanded the identity concept to a greater extent than ever before.<sup>42</sup> In *White*, the U.S. Court of Appeals for the Ninth Circuit held that Samsung employed *Wheel of Fortune* letter turner Vanna White's identity in violation of her right of publicity when the company's lighthearted ad for its products depicted a futuristic setting in which a blonde-haired, evening-gown-clad robot turned letters on a game show set.<sup>43</sup> Various commentators have criticized the *White* decision as

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<sup>38</sup> MCCARTHY ET AL., *supra* note 34, at 529.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983) (phrase "Here's Johnny"); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) (nickname "Crazylegs").

<sup>42</sup> 971 F.2d 1395 (9th Cir. 1992).

<sup>43</sup> *Id.* at 1399.

unsound in a number of ways.<sup>44</sup> However, the decision remains a leading one in marking the outer boundaries of the identity concept.<sup>45</sup>

A Ninth Circuit decision that preceded *White* altered the course of the right of publicity's evolution in another important way. In *Midler v. Ford Motor Co.*, the Ninth Circuit departed from past decisions addressing the use of vocal impersonators and held that when a celebrity has a distinctive singing voice, the defendant's commercial use of a sound-alike of the celebrity violates her right of publicity.<sup>46</sup> The court reasoned that if the celebrity has a distinctive voice, the voice identifies the celebrity in the minds of members of the public just as readily as the celebrity's name or facial appearance does.<sup>47</sup> The court concluded, therefore, that the distinctive voice is a protected part of the celebrity's identity.<sup>48</sup> The Ninth Circuit's decision cleared the way for Bette Midler to win her right of publicity case against an automobile manufacturer and an advertising agency that used a sound-alike of Midler in a television commercial for the manufacturer's cars.<sup>49</sup> *Midler* remains a leading right of publicity precedent in the voice misappropriation context<sup>50</sup> and, as such, is relevant to the performers' rights issues addressed in this Article.<sup>51</sup>

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<sup>44</sup> See, e.g., Michael G. Bennett, *Celebrity Politicians and Publicity Rights in the Age of Obama*, 36 HASTINGS COMM. & ENT. L.J. 339, 342, 353 (2014); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1178–80, 1195–97, 1217 (2006); Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity*, 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 181, 190, 194, 204–07 (2014); Langvardt, *supra* note 37, at 178–80.

<sup>45</sup> See Langvardt, *supra* note 37, at 179.

<sup>46</sup> 849 F.2d 460, 463 (9th Cir. 1988).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* For a voice to be distinctive, it must be recognizable in a variety of contexts, as opposed to being recognizable only if one particular song was used. See *id.* at 461–63.

<sup>49</sup> *Id.* at 461–62, 464.

<sup>50</sup> See MCCARTHY ET AL., *supra* note 34, at 529. *Midler* provided the guiding principles for the Ninth Circuit in another distinctive voice-based right of publicity decision. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). In *Waits*, the defendants used a sound-alike of well-known singer Tom Waits to sing an advertising jingle in a radio commercial for the defendants' Doritos chips. *Id.* at 1097–98. After concluding that the raspy-sounding Waits had a distinctive voice that was widely recognizable in the sense outlined in *Midler*, *id.* at 1098–1102, the Ninth Circuit upheld a very substantial jury verdict in favor of Waits on his right of publicity claim. *Id.* at 1102–06. Approximately \$400,000 of the total award consisted of compensatory damages for the fair market value

The performers' rights scenarios examined herein call for special attention to the *commercial use* element of a right of publicity claim. That element presents no difficulty for courts when the facts reveal that the defendant's supposed violation of the right occurred in a classic commercial use context: an advertisement for a product, service, or business (or the functional equivalent of such an ad).<sup>52</sup> For instance, the *White* and *Midler* cases arose in such a context.<sup>53</sup> Another classic example of a commercial use occurs when the defendant uses the plaintiff-celebrity's name or identity attribute as the name or designation of the defendant's product or business.<sup>54</sup> Effectively turning the celebrity into a product—as would occur when the defendant produces and sells a poster that consists of a photo of the celebrity—is also a commercial use.<sup>55</sup>

The commercial use determination, however, is not always so easy to make. Some uses may seem to have commercial characteristics as well as characteristics that may point in another direc-

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of his services, for loss of goodwill and professional standing, and for harm to his "peace, happiness, and feelings." *Id.* at 1103. In addition, the jury assessed \$2 million in punitive damages. *Id.* at 1104. Waits also sued on false endorsement grounds. *Id.* at 1106–11. That aspect of the case is discussed later in this Article. *See infra* text accompanying notes 193–208. Some courts limit the distinctive voice holdings of *Midler* and *Waits* to cases involving voice impersonations as opposed to the use of celebrities' actual voices. *See* *Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1056 (C.D. Cal. 2004); *Edwards v. Church of God in Christ*, No. 220348, 2002 Mich. App. LEXIS 2390, at \*4–5 (Mar. 8, 2002); *see also* *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1135–36, 1139–41 (9th Cir. 2006) (resting decision on preemption ground, but suggesting that voice misappropriation claims may be restricted to instances of impersonations). Given that broad identifiability of the voice is critical to the analysis in *Midler* and *Waits*, *see supra* note 48, the better approach treats a distinctive-voice-based right of publicity claim as appropriate where the defendant made a commercial use of the celebrity's distinctive voice, regardless of whether the use was of the actual voice or of a sound-alike who impersonated the celebrity. *See infra* text accompanying notes 121–26.

<sup>51</sup> *See infra* text accompanying notes 94–96, 121–227.

<sup>52</sup> Langvardt, *supra* note 37, at 173.

<sup>53</sup> *See* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992); *Midler*, 849 F.2d at 461–62; *see also* *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996) (concerning the use of legendary basketball player's former name in a television commercial).

<sup>54</sup> *See, e.g.*, *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833–37 (6th Cir. 1983).

<sup>55</sup> *See, e.g.*, *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 259–60 (7th Cir. 1984); *see also* *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867–68 (2d Cir. 1953) (concluding that a photograph of a baseball player constituted a commercial use).

tion.<sup>56</sup> It is important to note, therefore, that many uses for which there is an underlying profit motive are classified as noncommercial, rather than commercial, for right of publicity purposes. Books, movies, television shows, plays, newspapers, magazines, musical works, visual art, and other expressive works all have underlying profit-making motivations, but they are normally classified as noncommercial on the theory that their aspects related to information, educational, creative, or entertainment outweigh the financial motives.<sup>57</sup> Even when sales occur in the context of such uses, what is being promoted or sold is speech, rather than a product, for right of publicity purposes and, importantly, for First Amendment purposes.<sup>58</sup> When speech itself is sold—as in the case of a book—a noncommercial use presumably has occurred.<sup>59</sup> This example contrasts with advertisements of the sort at issue in cases such as *White* and *Midler*. The advertisements in those cases were clearly commercial in nature because, rather than promoting the sale of speech, they promoted the sale of products (electronic equipment in *White* and cars in *Midler*).<sup>60</sup>

Therefore, if the defendant's use of the plaintiff's name, likeness, or identity occurred in a noncommercial context (say, a magazine story about a celebrity's path to stardom), the plaintiff will usually lose her right of publicity claim.<sup>61</sup> Sometimes courts find that the right of publicity claim fails because the noncommercial nature of the use means that a key element of the claim has not been satisfied.<sup>62</sup> Other times, because the commercial-versus-

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<sup>56</sup> See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (involving T-shirts bearing a likeness of The Three Stooges that were reproduced from a charcoal drawing). For discussion of *Comedy III*, see *infra* text accompanying notes 107–08.

<sup>57</sup> Langvardt, *supra* note 37, at 174–75.

<sup>58</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–57 (1988); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

<sup>59</sup> *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430–33 (S.D.N.Y. 1978).

<sup>60</sup> See *supra* text accompanying notes 43, 49.

<sup>61</sup> See, e.g., *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 309–10 (9th Cir. 1992). *But see* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–76 (allowing liability to be imposed based on a fifteen-seconds-long film broadcast on a television newscast because the clip showed the performer's entire act).

<sup>62</sup> See, e.g., *New Kids on the Block*, 971 F.2d at 309–10; *Jackson v. MPI Home Video*, 694 F. Supp. 483, 492 (N.D. Ill. 1988).

noncommercial inquiry under the right of publicity basically tracks the commercial speech versus noncommercial speech inquiry under the First Amendment,<sup>63</sup> courts conclude that the right of publicity claim fails because the defendant is entitled to the very substantial First Amendment protection accorded to noncommercial speech.<sup>64</sup>

The degree of First Amendment protection for noncommercial speech suggests questions about the contexts addressed in this Article: political advertisements and campaign events meant to promote candidates who are seeking election to public office. Can a celebrity's right of publicity be violated when her name, likeness, or identity is used in such a context? Is the context sufficiently commercial to satisfy a key element of a right of publicity claim, considering the likelihood that those responsible for the advertisements and events hope to inspire not only voters, but also those who might contribute financially to the candidate's campaign or to a like-minded group? On the other hand, if books, movies, and the like are considered noncommercial for right of publicity purposes despite their underlying profit motives, should not the same be true of the political uses addressed herein, given the indirect (at most) financial motivations and the very high value placed on political speech in First Amendment jurisprudence?<sup>65</sup> *Browne v. McCain*, the right of publicity case most directly relevant to the performers' rights scenarios addressed in this Article, speaks to these issues and serves as the subject of the next Section.<sup>66</sup>

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<sup>63</sup> Commercial speech receives an intermediate level of First Amendment protection if it is not misleading and about a lawful activity, but receives no First Amendment protection if it misleads or promotes an unlawful activity. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760–63, 765, 769–71 (1976). Noncommercial speech, on the other hand, receives a very substantial level of protection known as “full” First Amendment protection. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001); *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790–91, 799 (2011).

<sup>64</sup> *See, e.g., Hoffman*, 255 F.3d at 1186–89.

<sup>65</sup> *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329, 339–40 (2010); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

<sup>66</sup> 611 F. Supp. 2d 1062 (C.D. Cal. 2009). The court dealt with other aspects of the case in separate opinions that bore the same date. *See infra* text accompanying notes 80–82.



B. *The Right of Publicity Claim in Browne v. McCain*

With the 2008 presidential campaign in full swing, the RNC and the Ohio Republican Party (“ORP”) created and publicly disseminated a web video that expressly supported the Republican nominee, Senator McCain, and commented unfavorably on his Democratic opponent, then-Senator Obama.<sup>67</sup> The video focused on the two candidates’ energy policies and portrayed the Obama policy as weak and ineffectual in comparison to the McCain policy.<sup>68</sup>

Partway through the video, as content critical of the Obama energy policy appeared, instrumental music played in the background.<sup>69</sup> The music was the introduction from Jackson Browne’s recording of *Running on Empty*,<sup>70</sup> a major hit for the singer-songwriter in 1977 and a key element of his identically titled, platinum-status album.<sup>71</sup> The instrumental music from the recording continued at differing volumes for roughly twenty seconds.<sup>72</sup> Near the end of the video, as the words “Barack Obama: Not Ready to Lead” appeared, another portion of the *Running on Empty* recording could be heard.<sup>73</sup> This time, it was Browne’s voice as he sang the song’s familiar chorus.<sup>74</sup>

The RNC, the ORP, and the McCain campaign did not have Browne’s consent for the use of any portion of *Running on Empty* in the video.<sup>75</sup> This fact did not sit well with Browne, who (as the court noted in its decision) supported then-candidate Obama and

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<sup>67</sup> *Browne*, 611 F. Supp. 2d at 1066–67. ORP posted the video on YouTube. The video also appeared on other websites and on television and cable networks in Ohio and Pennsylvania. In addition, the national news media reported on, aired, and discussed the video. *Id.* at 1067.

<sup>68</sup> *Id.* at 1066–67.

<sup>69</sup> *Id.* at 1066.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1065. The court noted that because platinum status for an album is acquired through the sale of a million copies, Browne’s album had actually acquired that status seven times over. *Id.* The court observed that the identically titled song and album “are both famously associated with Browne.” *Id.*

<sup>72</sup> *Id.* at 1066.

<sup>73</sup> *Id.* at 1067.

<sup>74</sup> *Id.* The lyrics of the chorus are: “Running on—running on empty, Running on—running blind, Running on—running into the sun, But I’m running behind.” *Id.* at 1066.

<sup>75</sup> *Id.* at 1067.

was “closely associated with liberal causes and Democratic political candidates.”<sup>76</sup> Only ten days after the video’s public release, Browne sued the RNC, the ORP, and Senator McCain in federal court in California.<sup>77</sup>

Browne pleaded three claims in his lawsuit: copyright infringement, violation of his right of publicity under California common law, and false endorsement under section 43(a) of the Lanham Act.<sup>78</sup> He succeeded in fending off the defendants’ attempts to have the case dismissed at an early stage.<sup>79</sup> In a series of opinions issued on the same date, the court denied the motions of the RNC and Senator McCain to strike the right of publicity claim,<sup>80</sup> and denied the defendants’ motions to dismiss for failure to state a claim on the copyright infringement<sup>81</sup> and false endorsement causes of

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<sup>76</sup> *Id.* at 1065. Browne’s support of Democratic candidates included performances at their political rallies. *Id.*

<sup>77</sup> *Id.* at 1067.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1067–68.

<sup>80</sup> *Id.* at 1073. As for the third defendant Browne sued, the ORP, the court issued a separate opinion in which it granted that defendant’s motion to dismiss for lack of personal jurisdiction. *Browne v. McCain*, 612 F. Supp. 2d 1118, 1121 (C.D. Cal. 2009).

<sup>81</sup> *Browne*, 611 F. Supp. 2d at 1073, 1078 (denying McCain’s motion to dismiss copyright infringement claim); *Browne*, 612 F. Supp. 2d at 1131 (denying RNC’s motion to dismiss copyright infringement claim). The fact that Browne wrote the song at issue and was its copyright owner enabled him to add a copyright infringement claim to the mix—something many performers cannot do. As noted earlier, performers who provide a rendition of a song on a recording often have no copyright interest to invoke because they did not write the song. *See supra* text accompanying note 15. Of course, such performers may, in appropriate instances, seek to bring the other claims included in *Browne v. McCain* (right of publicity and false endorsement), as well as the claim for which this Article advocates rejuvenated status (false light publicity). *See infra* text accompanying notes 391–431. This Article’s focus on non-copyright causes of action for performers means that detailed examination of copyright claims and issues is beyond the scope of the Article. Thus, only a brief review of the *Browne* court’s treatment of the copyright infringement claim is warranted here. Because the defendants had no license from Browne to use his copyrighted work in their web video, their only real chance of having the copyright infringement claim dismissed at such an early stage in the case would have been to convince the court that the fair use defense should protect them against liability. *See Browne*, 611 F. Supp. 2d at 1077. However, the court declined to conduct a full fair use analysis, reasoning that it would be premature to do so at the motion to dismiss (and therefore pre-discovery) stage. *Id.* at 107; *Browne*, 612 F. Supp. 2d at 1130–31. Still, the court did note that the defendants “ha[d] not established that Plaintiff’s claim is barred, as a matter of law, under the fair use doctrine.” *Browne*, 611 F. Supp. 2d at 1078; *Browne*, 612 F. Supp. 2d at 1130. The court added that “[t]he mere fact that Plaintiff’s claim is

action.<sup>82</sup> Because the parties then settled their dispute,<sup>83</sup> there was no final ruling on the merits. This Section examines the court's treatment of the right of publicity claim, and Section II.B. discusses the false endorsement aspect of the case.<sup>84</sup>

The RNC and Senator McCain based their motion to strike Browne's right of publicity claim on California's anti-SLAPP statute,<sup>85</sup> which provides a mechanism for early-stage dismissal of unmeritorious cases that arise from a defendant's exercise of free speech rights in regard to a matter of public interest.<sup>86</sup> The court concluded that the defendants had met their anti-SLAPP burden of showing that Browne's claim pertained to their speech-related activity regarding matters of public interest (the presidential election and the candidates' energy policies).<sup>87</sup> This meant that the burden shifted to Browne.<sup>88</sup> To resist the anti-SLAPP motion, he needed to demonstrate a probability of success on his right of publicity

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based on Defendants' use of his copyrighted work in a political campaign does not bar Plaintiff's claim as a matter of law." *Browne*, 611 F. Supp. 2d at 1078; *Browne*, 612 F. Supp. 2d at 1130.

<sup>82</sup> *Browne*, 611 F. Supp. 2d at 1078–81; *Browne*, 612 F. Supp. 2d at 1131–33. For a more detailed discussion of the court's treatment of the false endorsement claim, see *infra* text accompanying notes 210–57.

<sup>83</sup> Maral Vahdani, Comment, *Running on Empty: The Problem with Politicians and Stealing (Music)*, 32 LOY. L.A. ENT. L. REV. 75, 77 (2011).

<sup>84</sup> See *infra* text accompanying notes 210–57.

<sup>85</sup> CAL. CIV. PROC. CODE § 425.16 (West 2015). "SLAPP" stands for "strategic lawsuits against public participation."

<sup>86</sup> *Id.*; *Browne*, 611 F. Supp. 2d at 1067–68. The free speech rights at issue may be protected under either the First Amendment or the California Constitution. *Browne*, 611 F. Supp. 2d at 1067. The anti-SLAPP statute was enacted because of concern that plaintiffs may sometimes initiate litigation in order to squelch speech about matters of public interest, despite the constitutional protection such speech should have. See *Baral v. Schnitt*, 376 P.3d 604, 606, 608, 614–15 (Cal. 2016). Accordingly, the statute creates the prospect for early-stage dismissal of an unmeritorious case that likely would impinge upon free speech rights. A defendant seeking the benefit of the anti-SLAPP statute files a special motion to strike the plaintiff's claim and makes an initial showing that the plaintiff's claim pertains to the defendant's speech on a matter of public interest. CIV. PROC. § 425.16; see *Baral*, 376 P.3d at 608, 617. To avoid dismissal under the statute, the plaintiff must then demonstrate a probability of success on the claim. The case will be dismissed if the plaintiff does not so demonstrate, but if the plaintiff makes this showing, the case can go forward. CIV. PROC. § 425.16; see *Baral*, 376 P.3d at 608, 617.

<sup>87</sup> *Browne*, 611 F. Supp. 2d at 1068.

<sup>88</sup> *Id.* at 1068–69.

cause of action.<sup>89</sup> After preliminary discussion of the appropriate meaning of “probability” for purposes of the anti-SLAPP statute,<sup>90</sup> the court turned its attention to Browne’s chances of prevailing on right of publicity grounds.

California recognizes both a common law right of publicity and a statutory right of publicity, and permits one who cannot bring a statutory claim to invoke the common law variety.<sup>91</sup> This was important in *Browne*, because the plaintiffs’ claim was of the common law variety. Browne did not bring a statutory right of publicity claim,<sup>92</sup> presumably because the relevant statute contains language exempting claims based on would-be defendants’ use of voices in connection with political campaigns.<sup>93</sup>

The *Browne* court noted that in order to make out his common law right of publicity claim, the plaintiff needed to show that the defendants used his name, likeness, or identity without his consent for their “advantage, commercially or otherwise,” and that the defendants’ actions caused injury to him.<sup>94</sup> The court concluded that Browne had proven a use of his identity in the defendants’ video

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<sup>89</sup> *Id.*; see CIV. PROC. § 425.16(b)(1).

<sup>90</sup> The court noted that “the term ‘probability’ is susceptible to more than one meaning, which is problematic in this case where the outcome of [the defendants’] [m]otion depends on which meaning the Court adopts.” *Browne*, 611 F. Supp. 2d at 1069. One meaning would require Browne to show “a strong likelihood (i.e., more than fifty percent) that he will succeed,” whereas a more lenient meaning would require only that he demonstrate a “mere possibility” of success. *Id.* Relying on authority interpreting the anti-SLAPP statute as authorizing the striking of a claim only if it “arises from protected speech or petitioning *and* lacks even minimal merit,” *id.* (quoting *Navellier v. Sletten*, 52 P.3d 703, 708 (Cal. 2002)), the court concluded that the more lenient meaning of “probability” would apply and that Browne therefore would have to show only a “mere possibility of success on his claim” in order to defeat the anti-SLAPP motion. *Id.* As will be seen, this discussion of the meaning of “probability” is potentially important to an understanding of what to make of the court’s decision in *Browne*. See *infra* notes 117–19 and accompanying text.

<sup>91</sup> *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988); *Browne*, 611 F. Supp. 2d at 1069 n.3.

<sup>92</sup> *Browne*, 611 F. Supp. 2d at 1069 n.3.

<sup>93</sup> See *id.*; see also CAL. CIV. CODE § 3344 (West 2016) (providing a statutory right of publicity). That language probably would have barred Browne from winning a statutory claim against the RNC and McCain. See *id.*

<sup>94</sup> *Browne*, 611 F. Supp. 2d at 1069 (quoting *White*, 971 F.2d at 1397).

(which the court referred to as “the Commercial” in its analysis).<sup>95</sup> In particular, the court noted Browne’s presentation of “evidence that tends to show that his voice is sufficiently distinctive and widely known that, in light of the . . . success [of the musical composition *Running on Empty*], its use in the Commercial could constitute use of his identity.”<sup>96</sup>

According to the court, Browne met his burden of demonstrating that without his consent, the defendants “appropriated his identity to [their] advantage” by seeking and perhaps obtaining “increased media attention for Senator McCain’s candidacy.”<sup>97</sup> The court also stated that Browne had made a sufficient showing of injury resulting from the use of his identity, in the sense that the use of the musical composition in the video “gave the false impression that he was associated with or endorsed” the McCain campaign.<sup>98</sup> Therefore, the court concluded that Browne had made a sufficient showing regarding each element of his right of publicity claim.<sup>99</sup>

The court then turned to the defenses raised by the RNC and McCain. They first sought application of the public interest defense, which bars a right of publicity claim if the defendant’s use of the plaintiff’s identity was for news reporting purposes or similar public interest purposes.<sup>100</sup> The court rejected this argument, noting that even though the presidential campaign was obviously a matter of public interest, the defendants had not demonstrated how their use of *Browne’s identity* was a matter of public interest.<sup>101</sup>

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<sup>95</sup> *Id.* at 1070. Earlier, the court had noted that the *Running on Empty* song and album “are both famously associated with Browne.” *Id.* at 1065.

<sup>96</sup> *Id.* at 1070. In so holding regarding the use of Browne’s voice, the court expressly relied on the Ninth Circuit’s decision in *Midler*. *Id.* at 1070 n.5 (citing *Midler*, 849 F.2d at 463). For discussion of *Midler* and its role in establishing that a celebrity’s distinctive voice may be part of her identity for right of publicity purposes, see *supra* notes 46–51 and accompanying text.

<sup>97</sup> *Browne*, 611 F. Supp. 2d at 1070.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1071.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* The court noted that courts are more inclined to give credence to the public interest defense “when the defendant’s use of the plaintiff’s identity actually targets the plaintiff or matters related to the plaintiff.” *Id.* The defendants’ video did not single out Browne for commentary or criticism. *Id.* Instead, the defendants simply used Browne’s

Next, the court engaged in a brief treatment of the defendants' second argument: Their video was political speech, so the First Amendment should protect them against potential liability.<sup>102</sup> After stating that "political expression and speech uttered during a campaign for public office enjoys broad First Amendment protection,"<sup>103</sup> the court quickly followed up with the observation that "[i]f . . . such speech is false or misleading, it enjoys diminished protection."<sup>104</sup> According to the court, the defendants "ha[ve] not shown that political expression's broad First Amendment protection bars, as a matter of law, *all* actions based on allegedly improper

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identity as an aid in communicating their pro-McCain/anti-Obama message. *Id.* at 1071–72.

<sup>102</sup> *Id.* at 1072. The court's devotion of only three short paragraphs to the First Amendment discussion likely stemmed from the motion-to-strike posture in which the case came to the court. *See id.* One assumes that if the court had been ruling on the merits, it would have explored the First Amendment issues more fully.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (citing *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002)). As authority for this statement, the court included a citation to *Solano v. Playgirl, Inc.*, in which the Ninth Circuit held that the defendant should not have been granted summary judgment on the plaintiff's false light publicity and right of publicity claims concerning the use of his name and likeness in a way that created an impression the defendant knew was false. 292 F.3d at 1080–81, 1090. Taken literally, the statement quoted in the text asserts that the First Amendment protection for noncommercial speech is automatically diminished if the speech is false or misleading. *See Browne*, 611 F. Supp. 2d at 1072. But that assertion would not be an accurate statement of controlling First Amendment principles. Political speech and other forms of noncommercial speech receive the highest level of First Amendment protection (often known as full First Amendment protection). *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2011); *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790–91, 799 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329, 339–40 (2010). This is so, as a general rule, even if the speech is false or misleading. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (noting that there is no "general exception to the First Amendment for false statements"). Presumably what the *Browne* court meant to say in the statement quoted in the text is that despite the full First Amendment protection extended to noncommercial speech and the lack of a *general* falsehood exception to that protection, there are *certain* instances in which the maker of false statements may be held liable—for instance, when the plaintiff proves that the speaker made his statements with knowledge of their falsity or with reckless disregard for the truth. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71, 279–80 (1964) (holding that the First Amendment protects the publication of false statements about public officials unless the statement was made with actual malice, defined as knowledge of falsity or reckless disregard for the truth); *Solano*, 292 F.3d at 1084–87 (applying actual malice requirement in false light publicity case). Actual malice issues will be explored more fully in later sections dealing with false light publicity claims. *See infra* notes 358–90 and accompanying text.

use of a person's identity in campaign-related materials."<sup>105</sup> The defendants' argument for First Amendment protection struck the court as too sweeping and "particularly [unwarranted] in light of Browne's allegation that the Commercial gave the misleading impression that Browne endorsed Senator McCain's candidacy."<sup>106</sup>

As their third defense, the RNC and McCain sought protection against liability under a test devised in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, a 2001 case in which the Supreme Court of California weighed the property interests safeguarded by the right of publicity against the First Amendment protection normally extended to visual artists.<sup>107</sup> In *Comedy III*, the court struck the balance by holding that if the defendant artist's work amounted only to a literal reproduction of the plaintiff celebrity's likeness, the artist could be held liable for a right of publicity violation, but that if the work went beyond mere reproduction of the plaintiff's likeness and was transformative in the sense of adding new creative content, the artist would not be liable.<sup>108</sup> The defendants in *Browne* argued that including the plaintiff's song and recording in the campaign video amounted to a transformative use for which there should be no liability.<sup>109</sup>

The *Browne* court applied the transformative use test, but not with the result that the RNC and McCain wanted.<sup>110</sup> The court noted that "a transformative use contemplates actual transformation of a celebrity's likeness so that it becomes the defendant's own

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<sup>105</sup> *Browne*, 611 F. Supp. 2d at 1072. The court thus reasoned that the political campaign context of the defendants' use of Browne's identity was not enough by itself to warrant First Amendment protection against liability. *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 21 P.3d 797, 802-05 (Cal. 2001).

<sup>108</sup> *Id.* at 807-10. In the case, the defendant, Gary Saderup, created a charcoal drawing of The Three Stooges and sold the drawing in the form of lithographs and T-shirts to which he had transferred the image. *Id.* at 800-01. Applying its test, the court concluded that even though it took considerable artistic skill to produce an accurate drawing featuring the comedy trio's facial appearances, the drawing was a literal depiction that relied almost exclusively on the likenesses of The Three Stooges. *Id.* at 810-11. The drawing was not transformative because it did not add significant creative content to the depiction of the comedy trio in the sense that, say, a caricature might have. *Id.* at 811. Because the drawing was not transformative, Saderup was held liable to Comedy III, the owner of the deceased stars' rights of publicity. *Id.*

<sup>109</sup> *Browne*, 611 F. Supp. 2d at 1071-72.

<sup>110</sup> *Id.* at 1072-73.

expression.”<sup>111</sup> Because the defendants’ video “contained a verbatim copy of portions of [the recording] containing Browne’s voice”<sup>112</sup> and because the portions of the song and recording used in the video “were not altered in any way,” the defendants had not shown their use to be transformative.<sup>113</sup>

*C. Examining Browne Alongside Other Relevant Decisions*

Given the court’s treatment of the right of publicity claim, *Browne v. McCain* is clearly the key decision on which a performer would rely if she brought a right of publicity claim against those who used her identity in the context of a political ad or campaign event. The court adopted a performer-friendly view of the identity concept for purposes of the right of publicity claim’s elements<sup>114</sup> and declined to hold that the political context of the defendant’s use automatically triggers a First Amendment defense that trumps (no pun intended) the performer’s rights.<sup>115</sup> The court also demonstrated considerable willingness to seek a suitable balance between the plaintiff’s property rights and the competing interests of political users of the performer’s identity.<sup>116</sup> From the standpoint of would-be plaintiffs in right of publicity cases, these features of *Browne* are major advantages. But there are reasons why performers should not be unrestrainedly enthusiastic about *Browne*. Some reasons stem from the posture of the case when the court issued its ruling; others derive from the probability that not all courts would be comfortable with ruling as the court did in *Browne*. This Section explores both the positive and negative features of *Browne*.

It is important to remember that the *Browne* court’s treatment of the right of publicity claim came in the context of a ruling on the defendant’s motion to strike under California’s anti-SLAPP statute. To resist that motion, Browne needed to demonstrate a probability of success on his right of publicity claim.<sup>117</sup> Because the court determined that the anti-SLAPP statute and cases interpret-

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<sup>111</sup> *Id.* at 1072.

<sup>112</sup> *Id.* at 1072–73.

<sup>113</sup> *Id.* at 1073.

<sup>114</sup> *See id.* at 1069–70.

<sup>115</sup> *See id.* at 1072.

<sup>116</sup> *See id.*

<sup>117</sup> *Id.* at 1068–69.



ing it contemplated a lenient meaning for *probability*, Browne needed only to prove a *possibility* of success to fend off the motion to strike.<sup>118</sup>

Therefore, in deciding whether Browne satisfied the elements of a right of publicity claim, the court was applying a low standard. Would the court have ruled differently if it had been applying the preponderance of the evidence standard (which requires more than a mere possibility)? One statement by the court before it began its right of publicity analysis might so suggest, but it seems likely that the court did not intend to communicate such a message.<sup>119</sup> Even so, the prospect that the court might have viewed Browne's right of publicity claim differently under a higher standard should not be discounted.

Moreover, the fact that the court was not ruling on the merits may have affected its analysis—or at least the extent of its analysis—of the First Amendment issues. In the brief portion of the opinion dealing with those issues, the court suggested that in the pre-trial context in which it was ruling, it was not inclined to conduct a full-blown First Amendment analysis.<sup>120</sup> It is conceivable, but obviously by no means certain, that the court might have ruled differently on the First Amendment question if it had been ruling on the merits.

The court's conclusion that Browne possessed a distinctive voice that was part of his protected identity for right of publicity purposes<sup>121</sup> contemplated a broad scope for the identity concept. Importantly, the court's reliance on *Midler v. Ford Co.*,<sup>122</sup> as sup-

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<sup>118</sup> *Id.* at 1069; *see supra* note 90.

<sup>119</sup> The court stated that “the term ‘probability’ is susceptible to more than one meaning, *which is problematic in this case where the outcome of [the defendants’] motion depends on which meaning the [c]ourt adopts.*” *Browne*, 611 F. Supp. 2d at 1069 (emphasis added). Although this language could be read as an indication that the court would have ruled against Browne if it had been applying a higher standard of proof, the court's later analysis was very favorable to Browne and provided no further indications that the court was ruling in his favor only because the standard of proof was so low. *See id.* at 1070–73.

<sup>120</sup> *See id.* at 1072 (noting that “at this point,” the defendants had not shown that the First Amendment should bar Browne's claim).

<sup>121</sup> *Id.* at 1070 & n.5.

<sup>122</sup> 849 F.2d 460 (9th Cir. 1988).

porting authority for its distinctive voice ruling,<sup>123</sup> suggested that the court was not inclined to read *Midler* narrowly and hold that it applies only in voice *impersonation* cases. Some courts have interpreted *Midler* that way, probably because the case's facts involved the use of a Midler sound-alike rather than Midler's actual voice.<sup>124</sup> The *Browne* court's apparent reading of *Midler*—applying that decision to the actual-voice context in *Browne*—seems to be the better one.<sup>125</sup> If, as *Midler* held, a celebrity's distinctive voice identifies her in the public's mind just as readily as her name or a photo of her would,<sup>126</sup> that identification surely would occur just as readily when the celebrity's actual voice is used as when a sound-alike is used (if not more so than when the sound-alike is used). So, the *Browne* court probably was correct, but the real point here is that not all courts would agree.<sup>127</sup> In the absence of greater agreement

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<sup>123</sup> *Browne*, 611 F. Supp. 2d at 1070. *Midler* indicated that a celebrity has a distinctive voice only if it is readily recognizable by the public regardless of what else was being used, as opposed to an instance in which the voice was recognizable only in the context of a particular song. *Midler*, 849 F.2d at 461–63. *Compare Midler*, 849 F.2d at 461–63 (finding true distinctive voice because recognizable regardless of song being used), *with* *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 712–13, 716–17 (9th Cir. 1970) (concluding not a distinctive voice because probably not recognizable outside context of one particular song). In holding that *Browne* had sufficiently shown that he has a distinctive voice, the court apparently concluded that the voice's identifiability was not tied to the particular song used in the McCain ad. “[A]pparently concluded” is probably all that can be said here, however, because the court did make various references to the particular song and recording used by the defendant (*Running on Empty*) when it discussed *Browne*'s claim to a distinctive voice. *See Browne*, 611 F. Supp. 2d at 1065, 1067, 1070–71. Even so, it does seem likely that a court would find his voice to be readily identifiable even in the context of a song or recording other than *Running on Empty*, given *Browne*'s long career and recording success. *Browne* has been inducted into the Rock and Roll Hall of Fame and the Songwriters' Hall of Fame. He has released fourteen studio albums and four albums of live performances. *See Biography*, JACKSON BROWNE, <http://www.jacksonbrowne.com/biography> [<https://perma.cc/2UAA-HM24>] (last visited Mar. 7, 2017).

<sup>124</sup> *See* *Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1056 (C.D. Cal. 2004); *Edwards v. Church of God in Christ*, No. 220348, 2002 Mich. App. LEXIS 2390, at \*4–5 (Mar. 8, 2002); *see also* *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1135–36, 1139–41 (9th Cir. 2006) (suggesting that voice misappropriation claims may be restricted to instances of impersonations).

<sup>125</sup> *See Browne*, 611 F. Supp. 2d at 1070; *see also* *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 63–64 (2d Cir. 2001) (permitting right of publicity claim to go forward when defendant's television commercial used recording that featured plaintiff's actual voice). For discussion of other issues in *Oliveira*, *see infra* text accompanying notes 272–89.

<sup>126</sup> *Midler*, 849 F.2d at 463.

<sup>127</sup> *See, e.g., Butler*, 323 F. Supp. 2d at 1056.

on this question, performers may not be able to count on the ability to succeed with a right of publicity claim when their voices are used for political purposes.<sup>128</sup>

The *Browne* court's decision also provided, at least in the pre-trial posture of the case, favorable treatment for the plaintiff on two related questions: whether right of publicity liability could be established in regard to a political ad; and whether the First Amendment

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<sup>128</sup> Another point of potential uncertainty concerns the possibility of federal preemption when the use of a copyrighted song is part of a right of publicity case's facts. Section 301 of the Copyright Act provides that a plaintiff's state-law-based claim (such as the right of publicity) is preempted by the Copyright Act if the plaintiff asserts rights over a work fixed in a tangible medium of expression (and thus within the scope of the Copyright Act) and the state-law-based claim, if allowed to proceed, would grant a right equivalent to a right granted to copyright owners. 17 U.S.C. § 301 (2012). Courts have struggled at times in determining whether preemption is mandated, either under the express preemption provision in section 301 or under principles of implied preemption, in a performer's right of publicity case that has the use of a copyrighted song as part of the facts. Sometimes courts have ruled that the plaintiff's claim is preempted. *See, e.g., Laws*, 448 F.3d at 1135, 1137–45; *Butler*, 323 F. Supp. 2d at 1055–57. A key issue, however, is whether the plaintiff has a true distinctive voice in the sense of being recognizable by the public regardless of the song used (i.e., even if the defendant had used a song other than the copyrighted song the defendant actually used). *Midler*, 849 F.2d at 461–63. If so, the plaintiff is legitimately claiming rights over her *voice*, as opposed to the particular copyrighted song used by the defendant—meaning that the plaintiff's claim would not be preempted. *See id.* at 462. However, if the voice is recognizable only in the context of the particular song used by the defendant, the plaintiff is effectively claiming rights in that particular song and her right of publicity claim, therefore, is preempted. *See Sinatra*, 435 F.2d at 712–13, 716–17; *Butler*, 323 F. Supp. 2d at 1055–57. Courts also hold that section 301 of the Copyright Act will not preempt a state-law-based claim if that claim calls for proof of an additional element beyond what must be proven in a copyright infringement case. *See, e.g., Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 430–32 (2d Cir. 2012); *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 980–81 (9th Cir. 2011); *Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1027–31 (3d Cir. 2008). In *Facenda*, for instance, the court held that the voice misappropriation-related right of publicity claim at issue—a claim based on use of recording of the actual voice of the plaintiff's decedent—required proof of an extra element and therefore was not preempted under section 301. *Id.* at 1027–31. The court also concluded that implied preemption was not appropriate either. *Id.* In *Browne*, the court did not discuss preemption, but the fact that the court let *Browne*'s case go forward would seem to suggest that the court did not think his case was a candidate for preemption. Given the court's holding that he had a distinctive voice (presumably in the *Midler* sense described above), the court was correct in apparently concluding that preemption should not occur. *See Browne*, 611 F. Supp. 2d at 1070. Again, even if the *Browne* court correctly concluded that preemption should not occur, the relevant point here is that other courts—rightly or wrongly—might come to a different conclusion on *Browne*-like facts. This prospect underscores the unpredictability of right of publicity claims in performers' cases of the sort examined here.

should protect the defendants against liability.<sup>129</sup> In responding *yes* to the first question and *no* (or, perhaps more accurately, *not at this stage in the proceedings*) to the second,<sup>130</sup> the court offered answers that California law facilitated in ways other states' law might not have. The usual insistence for right of publicity purposes on whether the defendant made a commercial use<sup>131</sup> may be less rigid under California law because of cases indicating that an element of the claim is whether the defendant appropriated the plaintiff's name, likeness, or identity "to [the] defendant's advantage, commercially or otherwise."<sup>132</sup> The "or otherwise" formulation of a key right of publicity element enabled the *Browne* court to conclude that in using the plaintiff's identity, the defendants gained the requisite advantage by drawing greater attention to Senator McCain's campaign for the presidency<sup>133</sup> (something that would not seem commercial in the usual sense of an ad for a product, service, or business).<sup>134</sup>

California case law also indicates that some uses traditionally regarded as noncommercial may trigger right of publicity liability if they employed a literal, non-transformative depiction of the plaintiff's likeness or identity.<sup>135</sup> That rule, when articulated in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, led to right of publicity liability against a visual artist even though works of art are usually considered noncommercial in nature.<sup>136</sup> The *Comedy III* approach also led to the *Browne* court's conclusion that the defendants were potentially liable for their non-transformative use of the plaintiff's identity in a political ad<sup>137</sup> (again, not a classic commercial use in the sense that an ad for a product, service, or business would be.)<sup>138</sup> Other courts, perhaps applying another state's law that might not afford as much flexibility as California law on this element, could

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<sup>129</sup> *Browne*, 611 F. Supp. 2d at 1072.

<sup>130</sup> *See id.*

<sup>131</sup> *See supra* text accompanying notes 35–36, 52–59.

<sup>132</sup> *Browne*, 611 F. Supp. 2d at 1069 (emphasis added) (quoting *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992)).

<sup>133</sup> *Id.* at 1070.

<sup>134</sup> *See supra* text accompanying notes 52–53.

<sup>135</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807–11 (Cal. 2001).

<sup>136</sup> *Id.* at 811.

<sup>137</sup> *Browne*, 611 F. Supp. 2d at 1072–73.

<sup>138</sup> *See supra* text accompanying notes 52–53.

be less inclined to regard a political ad such as the one in *Browne* as sufficiently commercial for right of publicity purposes.<sup>139</sup>

Then there is the matter of California's two options—one statutory and one common law—for establishing right of publicity liability.<sup>140</sup> The statutory option would not have worked for *Browne* because of the applicable statute's exemption for uses of a celebrity's voice in a political campaign.<sup>141</sup> With no precedent seeming to establish a similar political-use exemption from liability when the plaintiff sued on the basis of the common law right of publicity, *Browne* was free to choose the common-law route.<sup>142</sup>

But *should* the statutory and common-law varieties of the right of publicity treat political campaigns' uses of plaintiffs' (or would-be plaintiffs') voices differently? This question suggests a need to think about why the political-use exemption appears in the California statute. A cynic might say that because the California lawmakers are politicians, they wanted the exemption in the statute so that they would be free to use celebrities' voices in their political ads and not have to worry about right of publicity liability. Although one cannot completely dismiss that possibility, a better explanation emerges when cynicism is set aside: It seems likely that the placement of the political-use exemption in the statute stemmed from a desire to keep the statutory cause of action within permissible First Amendment bounds, given the lofty status that political speech usually holds in the free speech realm.<sup>143</sup>

If First Amendment concerns motivated the legislature to include the political-use exemption in the statute, it can be argued credibly that courts construing the common-law variety of a right of publicity claim should have similar concerns, unless the legisla-

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<sup>139</sup> Cf. *MasterCard Int'l, Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ. 6068 (GBD), 2004 U.S. Dist. LEXIS 3644, at \*22–29 (S.D.N.Y. Mar. 8, 2004) (holding that defendant political campaign's use of plaintiff company's trademarks in political ad was noncommercial use that could not give rise to valid claim for trademark dilution).

<sup>140</sup> *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988); *Browne*, 611 F. Supp. 2d at 1069 n.3; see also CAL. CIV. CODE § 3344 (West 2016) (providing a statutory right of publicity).

<sup>141</sup> See *Browne*, 611 F. Supp. 2d at 1069 n.3; CIV. § 3344.

<sup>142</sup> *Browne*, 611 F. Supp. 2d at 1069 n.3.

<sup>143</sup> See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790–91, 799 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329, 339–40 (2010).

ture was overvaluing the potentially affected speech and misapplying First Amendment principles. The familiar notion that political speech rights lie at the core of the First Amendment<sup>144</sup> suggests, however, that the legislature's inclusion of the political-use exemption did not stem from a distorted sense of what the First Amendment does or should protect. The *Browne* court's brief treatment and rejection of the defendants' First Amendment argument did not indicate that the court found it difficult to resolve the conflict between property rights and speech rights, but it must be kept in mind that the court was weighing in at an early stage in the proceedings and probably was hesitant to offer a sweeping free speech ruling of the sort the defendants wanted.<sup>145</sup> Had it ruled on the merits, the court might or might not have come out the same way on the political speech question. But, at the very least, the court would have analyzed the question more fully and would have found it a close one.

The closeness of this question also suggests that some courts deciding right of publicity cases with facts similar to those in *Browne* could answer it by placing greater weight on the noncommercial use/free speech side of the scale. For instance, in *Hoffman v. Capital Cities/ABC, Inc.*, a right of publicity decision the *Browne* court probably would have had to address if *Browne* had proceeded to a ruling-on-the-merits stage,<sup>146</sup> the Ninth Circuit concluded that a magazine engaged in noncommercial speech when it used an altered photo of actor Dustin Hoffman (the plaintiff) in connection with a lighthearted feature story on fashion trends.<sup>147</sup> That determination probably would have caused some courts to rule against the plaintiff on the ground that noncommercial uses do not violate the right of publicity.<sup>148</sup> In keeping with California law, however, the Ninth Circuit did not regard the noncommercial character of the use as automatically fatal to Hoffman's right of publicity

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<sup>144</sup> See, e.g., *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

<sup>145</sup> See *Browne*, 611 F. Supp. 2d at 1072 (noting that "at this point," the defendants had not shown that the First Amendment should bar *Browne's* claim).

<sup>146</sup> *Browne* was decided by the U.S. District Court for the Central District of California, which is subject to rulings by the Ninth Circuit Court of Appeals. *Hoffman* was a Ninth Circuit decision.

<sup>147</sup> 255 F.3d 1180, 1182-83, 1186 (9th Cir. 2001).

<sup>148</sup> See *supra* text accompanying notes 56-64.

claim.<sup>149</sup> Instead, the court held that because the magazine feature story and accompanying pictures were noncommercial speech, and therefore highly valued under the First Amendment,<sup>150</sup> Hoffman needed to prove actual malice—a stern First Amendment-based fault requirement—in order to win the case.<sup>151</sup> Unable to establish actual malice, Hoffman lost.<sup>152</sup>

For courts considering right of publicity cases in which celebrities complain about uses of their identities in political ads, or in connection with political events, *Hoffman* could be especially influential. They could credibly reason that if a magazine’s entertainment-oriented feature deserves the highest level of First Amendment protection, so does a defendant’s political use. After all, the First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”<sup>153</sup>

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<sup>149</sup> *Hoffman*, 255 F.3d at 1186.

<sup>150</sup> *Id.* at 1184–86.

<sup>151</sup> *Id.* at 1184–87. In *New York Times Co. v. Sullivan*, the Supreme Court held that when a public official brings a defamation lawsuit, the First Amendment protection extended to political and other noncommercial speech demands that he prove, by clear and convincing evidence, that the defendant made the false statement at issue with actual malice. 376 U.S. 254, 256–59, 264, 268–70, 279–80 (1964). The Court defined *actual malice* as knowledge of falsity or reckless disregard for the truth. *Id.* at 279–80. Later, the Court extended the proof of actual malice requirement to public figure plaintiffs who sue for defamation or intentional infliction of emotional distress. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result) (defamation). In addition, the Court has required proof of actual malice in false light publicity cases. See *Time, Inc. v. Hill*, 385 U.S. 374, 387–90 (1967). The actual malice requirement is explored more fully in the Article’s later sections dealing with the potential usefulness of false light publicity claims to performers in the political use settings on which this Article focuses. See *infra* text accompanying notes 358–75. *Hoffman* serves as an example of a judicial inclination to require proof of actual malice when a well-known plaintiff seeks legal relief because of false representations about him—even when the plaintiff invokes a legal theory other than the ones as to which the Supreme Court has said the actual malice requirement attaches. See *Hoffman*, 255 F.3d at 1186–87. In *Hoffman*, the famous actor’s right of publicity claim was premised on the notion that, in using the altered photos in the magazine, the defendants created the false impression that Hoffman had participated voluntarily in a photo shoot for the magazine and the false impression that the body shown in the altered photo was Hoffman’s actual body. See *id.* at 1187–88.

<sup>152</sup> *Hoffman*, 255 F.3d at 1188.

<sup>153</sup> *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Other decisions may be influential in similar ways and may complicate a celebrity's attempts to succeed on a right of publicity claim regarding a use of her identity in a political context. Consider, for instance, *Facenda v. NFL Films, Inc.*<sup>154</sup> In that case, the U.S. Court of Appeals for the Third Circuit affirmed a grant of summary judgment in favor of the plaintiff, the executor of his father's estate, on a right of publicity claim based on the defendant's use of the father's distinctive voice in a television program about a video game.<sup>155</sup> The court held that even though a television program normally would be considered noncommercial, the program was effectively an infomercial-like advertisement for the video game and thus was sufficiently commercial for purposes of the right of publicity claim.<sup>156</sup> Although *Facenda* may seem helpful to plaintiffs in cases in which they complain about uses of their voices (and hence identities) in political settings, some courts could distinguish the case from the political use context on the ground that the television program in *Facenda* functioned as the equivalent of an ad for a product (a video game), whereas in the political setting, speech is what is being sold.<sup>157</sup>

Moreover, even though it ruled in favor of the plaintiff, the *Facenda* court issued this warning: "Despite our holding, we emphasize that courts must circumscribe the right of publicity so that musicians, actors, and other voice artists do not get a right that extends beyond commercial advertisements to other works of artistic expression."<sup>158</sup> Political ads and political campaign events presumably are not the same as "works of artistic expression," but on the spectrum of possible uses, some courts may see political uses as closer to artistic expression than to advertisements for products.<sup>159</sup> Those that do so may be hesitant to approve of right of publicity claims against political users.

Finally, a decision dealing with a political advertisement merits consideration here even though it was not a right of publicity case.

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<sup>154</sup> 542 F.3d 1007 (3d Cir. 2008).

<sup>155</sup> *Id.* at 1011–12, 1025–26, 1031–33.

<sup>156</sup> *Id.* at 1016–18, 1030.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1032.

<sup>159</sup> *See supra* note 104.



It nevertheless sheds light on how courts might classify the use at issue in right of publicity cases dealing with uses of the plaintiff's identity in a political context. In *MasterCard International, Inc. v. Nader 2000 Primary Committee, Inc.*, MasterCard alleged that Ralph Nader's presidential campaign committed trademark infringement, trademark dilution, and copyright infringement when the campaign broadcast a Nader ad that borrowed from MasterCard's "Priceless" commercials in an effort to express political views and promote Nader's candidacy.<sup>160</sup> On the trademark dilution claim, a critical issue was whether the Nader ad constituted a noncommercial use. If the ad was noncommercial, an exemption in the Federal Trademark Dilution Act would apply and the ad could not serve as the basis for a valid dilution claim.<sup>161</sup>

MasterCard argued that the ad should be treated as commercial because financial contributions to Nader's campaign supposedly increased after the ad began running.<sup>162</sup> The court, however, declined to give that argument the effect MasterCard desired.<sup>163</sup> After noting that the Nader ad "is not designed to entice consumers to buy products or services, and does not propose any kind of commercial transaction," the court stated that "[e]ven assuming the Nader [a]d caused greater contribution to be made to his political campaign, this would not be enough to deem [the ad] 'commercial.'"<sup>164</sup> If that supposed fact sufficed to make the ad commercial, the court continued, "all political campaign speech would also be 'commercial speech' since all political candidates collect contributions."<sup>165</sup> The court concluded, therefore, that even though the Nader campaign used the plaintiff's trademarks in their ad, the po-

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<sup>160</sup> No. 00 Civ. 6068 (GBD), 2004 U.S. Dist. LEXIS 3644, \*1-4 (S.D.N.Y. Mar. 8, 2004). The court granted summary judgment to the defendants on the trademark infringement claim because the plaintiff had failed to prove the necessary likelihood of confusion among consumers. *Id.* at \*5-14. On the copyright infringement claim, the court granted summary judgment to the defendants after holding that the fair use defense would protect them against liability. *Id.* at \*31-49.

<sup>161</sup> *Id.* at \*22-29; see 15 U.S.C. § 1125(c) (2012).

<sup>162</sup> *MasterCard*, 2004 U.S. Dist. LEXIS 3644, at \*23.

<sup>163</sup> *Id.* at \*24.

<sup>164</sup> *Id.* at \*23.

<sup>165</sup> *Id.* at \*23-24.

litical nature of the ad made it noncommercial and, therefore, not a basis for liability on dilution grounds.<sup>166</sup>

As this Part's analysis has revealed, the court's treatment of the right of publicity claim in *Browne v. McCain* should be reassuring for celebrities whose voices were used in political contexts without their consent, but the decision must be viewed with proper perspective.<sup>167</sup> There are various reasons why some courts may be likely to take a dimmer view of right of publicity claims in such settings.<sup>168</sup> Celebrities, accordingly, should not regard the right of publicity as a consistently attractive theory for protecting their interests when others make political uses of their names, likenesses, or identities. Another so far unutilized theory is the subject of later discussion and analysis.<sup>169</sup> First, however, the following Part examines the other theory, aside from the right of publicity, that plaintiffs have employed in cases involving political uses of their identities: false endorsement under section 43(a) of the Lanham Act.

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<sup>166</sup> *Id.* at \*28. In conducting its analysis and issuing its ruling on the commercial-or-noncommercial use issue, the court relied on another federal court's decision in a similar case. *Id.* at \*26–28 (citing *Am. Family Life Insurance Co. v. Hagan*, 266 F. Supp. 2d 682 (N.D. Ohio 2002)). In *American Family Life Insurance Co. v. Hagan*, the defendant (Hagan) was a candidate for Governor of Ohio. His campaign ran ads that promoted his candidacy and criticized his opponent, incumbent Governor Robert Taft. 266 F. Supp. 2d at 685. The Hagan ads used a “TaftQuack” character that drew upon the plaintiff insurance company's trademark, the American Family Life Insurance Company (“AFLAC”) duck. *Id.* at 685–86. The Hagan campaign also operated a “taftquack.com” website that promoted Hagan's candidacy and sought financial donations. *Id.* at 686–87. AFLAC sued on various grounds, including trademark dilution. *Id.* at 685. As in *Nader*, the key issue for purposes of the dilution claim was whether the Hagan ads and website were noncommercial and hence not subject to liability under the Federal Trademark Dilution Act. *Id.* at 695–701. Using reasoning similar to that employed later in *Nader*, the *Hagan* court held that the ads and website constituted political speech and were therefore noncommercial in nature. *Id.* at 697–98, 700–01.

<sup>167</sup> *See supra* text accompanying notes 117–20.

<sup>168</sup> *See supra* text accompanying notes 121–66.

<sup>169</sup> *See infra* text accompanying notes 296–431.

## II. PERFORMERS' FALSE ENDORSEMENT CLAIMS AGAINST POLITICAL USERS

### A. Background on False Endorsement Claims Under Section 43(a)

The federal Lanham Act governs the registration and protection of trademarks.<sup>170</sup> Section 43(a) of the statute, however, extends beyond the trademark rights setting and has been interpreted as sweeping in other claims of an unfair competition nature.<sup>171</sup> In the portion relevant here, section 43(a) proscribes the making of false or misleading representations by a provider of goods or services if those representations create a likelihood of confusion about whether an affiliation or relationship of sponsorship or endorsement exists between the provider of the goods or services and another person.<sup>172</sup> The section 43(a) violator may face civil liability to a party harmed by the false or misleading representations.<sup>173</sup>

Courts interpreting section 43(a) have held that in addition to covering claims for infringement of unregistered trademarks,<sup>174</sup> the

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<sup>170</sup> See 15 U.S.C. §§ 1051–1141 (2012).

<sup>171</sup> *Id.* § 1125(a); see, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28–29 (2003).

<sup>172</sup> Section 43(a) reads:

(1) Any person who, on or in connection with any goods or services, or any container of goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

§ 1125(a)(1). Section 1125(a)(1)(A) covers certain claims of unfair competition or unfair trade practices, if those claims are sufficiently connected to the statute's text. *Dastar*, 539 U.S. at 29. Section 1125(a)(1)(B) authorizes false advertising claims by one competitor against another. Section 43(a)-based false advertising claims are not pertinent to the issues addressed in this Article and will not be discussed further.

<sup>173</sup> § 1125(a)(1).

<sup>174</sup> See, e.g., *Dastar*, 539 U.S. at 29–30, 31–32 (discussing section 43(a)'s application to trademark infringement claims, including ones based on unregistered trademarks). The

statute authorizes certain unfair competition claims that are sufficiently false representation-oriented.<sup>175</sup> The list includes passing off, reverse passing off,<sup>176</sup> and false endorsement,<sup>177</sup> with the latter being the most relevant section 43(a) claim for purposes of this Article. In recognizing false endorsement as a permissible claim under section 43(a), courts have concluded that the requisite false representations by providers of goods or services need not be express in nature. Implied representations suffice for purposes of the statute, if they convey the untrue message that the plaintiff endorses the defendant's goods or services.<sup>178</sup> To succeed with the false endorsement claim, the plaintiff must also satisfy the statutory requirement of proving a likelihood of confusion on the part of the public as to whether such an endorsement relationship exists between the parties.<sup>179</sup>

The fact patterns underlying false endorsement claims tend to resemble the fact patterns in right of publicity cases—so much so that plaintiffs often plead the two theories in the alternative.<sup>180</sup> The required likelihood of confusion element in false endorsement cases, however, distinguishes the two causes of action from each other. Likelihood of confusion is not a required element of a right of publicity claim, even though a policy concern supporting recognition of the right of publicity is the desire to prevent the public from

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“word, name, symbol, or device” and “likely to cause confusion” references in section 43(a) have a trademark infringement ring to them. *See* § 1125(a)(1)(A); *Dastar*, 539 U.S. at 29–30, 31–32.

<sup>175</sup> *See Dastar*, 539 U.S. at 29.

<sup>176</sup> *Id.* at 27–28, 30–31. Passing off “occurs when a producer misrepresents his own goods or services as someone else’s,” whereas reverse passing off “is the opposite: [t]he producer represents someone else’s goods or services as his own.” *Id.* at 27 n.1. In *Dastar*, the Court indicated that reverse passing off claims may indeed be brought under section 43(a), but noted that in the case before it, the plaintiff’s claim was unmeritorious. *See id.* at 31–38.

<sup>177</sup> *See, e.g.,* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106–11 (9th Cir. 1992); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399–1401 (9th Cir. 1992); *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612, 625–30 (S.D.N.Y. 1985).

<sup>178</sup> *See, e.g.,* *Waits*, 978 F.2d at 1110–11; *Allen*, 610 F. Supp. at 626–28.

<sup>179</sup> *See* § 1125(a)(1)(A).

<sup>180</sup> *See, e.g.,* *Waits*, 978 F.2d at 1096–98; *White*, 971 F.2d at 1396; *Allen*, 610 F. Supp. at 617.

reaching the erroneous conclusion that the celebrity endorses a particular product, service, or business.<sup>181</sup>

Two leading false endorsement decisions furnish useful illustrations. In *Allen v. National Video, Inc.*,<sup>182</sup> a federal district court granted famous movie director and actor Woody Allen summary judgment on his false endorsement claim<sup>183</sup> against a video rental company that used a look-alike of him in advertisements.<sup>184</sup> After noting that section 43(a) of the Lanham Act reaches “potential deception which threatens economic interests analogous to those protected by trademark law,”<sup>185</sup> the court observed that a celebrity such as Allen has “a similar commercial investment in the ‘drawing power’ of his or her name and face in endorsing products and in marketing a career.”<sup>186</sup> Accordingly, the court concluded that false endorsement claims involving the misleading use of a celebrity’s name or photo could be actionable under the statute.<sup>187</sup> Allen’s claim presented the look-alike wrinkle, but the court did not regard that fact as calling for an analysis different from the analysis employed in the name or photo cases.<sup>188</sup> The key question remained: “whether defendant’s advertisement creates the likelihood of consumer confusion over whether plaintiff endorsed or was otherwise involved with [defendant’s] goods and services?”<sup>189</sup>

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<sup>181</sup> See *supra* text accompanying note 36.

<sup>182</sup> 610 F. Supp. 612 (S.D.N.Y. 1985).

<sup>183</sup> Allen also sued on right of publicity grounds, with the key issue being whether the defendant’s use of an Allen look-alike amounted to the use of the celebrity’s “portrait or picture,” as required by the applicable New York statute. *Id.* at 622; see N.Y. CIV. RTS. LAW §§ 50–51 (McKinney 2016). After lengthy discussion, see *Allen*, 610 F. Supp. at 620–25, the court found it unnecessary to decide that issue and unnecessary to rule on the right of publicity claim, because false endorsement clearly furnished Allen a basis for winning the case. *Id.* at 624–25.

<sup>184</sup> *Allen*, 610 F. Supp. at 617–18, 625–32.

<sup>185</sup> *Id.* at 625. The court was thus confirming that section 43(a) extends beyond pure trademark claims. See *id.*

<sup>186</sup> *Id.* In addition, the court noted that the celebrity’s drawing power depends upon the development of public goodwill. *Id.* at 626. This means that “infringement of the celebrity’s rights also implicates the public’s interest in being free from deception when it relies on a public figure’s endorsement in an advertisement.” *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See *id.*

<sup>189</sup> *Id.* at 627.

National Video's advertisement did not expressly say that Allen endorsed the video rental store, but Allen proved the existence of an implied message of endorsement that stemmed from the degree of similarity between the look-alike's appearance and Allen's appearance and from other aspects of the advertisement's visual content.<sup>190</sup> The court also reached the "inescapable conclusion" that the defendants' use of the look-alike in their advertisement created the requisite likelihood of confusion regarding endorsement or similar involvement.<sup>191</sup> Hence, Allen was entitled to summary judgment and injunctive relief on the false endorsement claim.<sup>192</sup>

The reasoning in *Allen* influenced the Ninth Circuit's analysis in *Waits v. Frito-Lay, Inc.*, the second of the two false endorsement cases examined here.<sup>193</sup> *Waits* holds special relevance for this Article's purposes because the case involved the defendant's use of a celebrity's recognizable voice in an advertisement. In a radio commercial for the company's Salsa Rio Doritos, Frito-Lay included an advertising jingle sung by a sound-alike of well-known, raspy-voiced singer Tom Waits.<sup>194</sup> The evidence in Waits's lawsuit against Frito-Lay and its advertising agency revealed that the defendants wanted the vocal impersonator who sang in the commercial to imitate Waits's voice.<sup>195</sup> Waits sued on two alternative grounds: right of publicity and false endorsement. The Ninth Circuit upheld a jury verdict of more than \$2 million in favor of Waits on his right of publicity claim.<sup>196</sup> This Section focuses on the court's determination of whether the false endorsement claim furnished Waits an alternative basis for relief.

As a preliminary matter, the court addressed what it regarded as a question of first impression in the Ninth Circuit: whether false

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<sup>190</sup> See *id.* at 617-18, 625-26, 627 n.8. The court observed that "[w]hen a public figure of Woody Allen's stature appears in an advertisement, his mere presence is inescapably to be interpreted as an endorsement." *Id.* at 627 n.8.

<sup>191</sup> *Id.* at 628.

<sup>192</sup> *Id.* at 630-32.

<sup>193</sup> 978 F.2d 1093, 1106, 1110-11 (9th Cir. 1992) (citing *Allen*, 610 F. Supp. at 625-28).

<sup>194</sup> *Id.* at 1096-98.

<sup>195</sup> See *id.* at 1097-98. The court noted that Waits had long taken a public stance that as an artist, he would not take part in commercials for products. *Id.* at 1097.

<sup>196</sup> *Id.* at 1102-06; see also *supra* note 50.

endorsement claims may be pursued under section 43(a).<sup>197</sup> The court found it persuasive that in various decisions, including *Allen*, other courts had provided a “yes” answer to that question.<sup>198</sup> Through its own examination of the statutory language and relevant legislative history, the Ninth Circuit became further convinced that section 43(a) authorizes false endorsement claims, including those based on the invocation of a celebrity’s distinctive voice.<sup>199</sup>

The defendants argued that even if some false endorsement claims are cognizable under section 43(a), Waits lacked standing to make the claims because he was not the defendants’ competitor.<sup>200</sup> In rejecting this argument, the court cited *Allen* for the propositions that competitor status is not always necessary and that the plaintiff may invoke section 43(a) if he or she has an economic interest “in controlling the commercial exploitation of his or her identity.”<sup>201</sup> The Ninth Circuit held, therefore, that “a celebrity whose endorsement of a product is implied through the imitation of a distinctive attribute of the celebrity’s identity[] has standing to sue for false endorsement” under section 43(a).<sup>202</sup> Because Waits had the requisite economic interest concerning his identity, he was entitled to seek relief “for the imitation of his voice on the theory that its use falsely associated him with Doritos as an endorser.”<sup>203</sup>

In considering the merits of Waits’s claim, the Ninth Circuit examined the evidence regarding two interrelated questions: (1) whether, as the plaintiff alleged, the defendants’ commercial falsely implied a product endorsement; and (2) whether the commercial created a likelihood of consumer confusion along those lines?<sup>204</sup> The jury listened to the defendants’ commercial and to recordings of Waits’s actual voice.<sup>205</sup> In addition, the jury heard evidence indicating that the defendants wanted the vocal impersonator to im-

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<sup>197</sup> *Waits*, 978 F.2d 1093, 1106.

<sup>198</sup> *Id.* at 1106–07.

<sup>199</sup> *Id.* at 1107.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1110.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1110–11.

<sup>205</sup> *Id.* at 1111.

itate Waits, that the commercial was targeted to an audience of the same age range as many Waits fans, and that numerous consumers thought Waits actually sang in the commercial.<sup>206</sup> The Ninth Circuit concluded that the evidence “was sufficient to support the jury’s finding that consumers were likely to be misled by the commercial into believing that Waits endorsed [Salsa Rio] Doritos.”<sup>207</sup>

With its approving nod to section 43(a)-based false endorsement claims stemming from defendants’ uses of celebrities’ distinctive voices, *Waits* is a significant decision for purposes of the scenarios addressed in this Article. But *Waits* involved a use that was clearly commercial in nature,<sup>208</sup> as opposed to a political use such as a candidate’s campaign ad or a campaign event. Whether that difference matters—or should matter—for purposes of section 43(a) is a question that merits further examination.<sup>209</sup> The following sections begin that process by focusing on the two leading cases in which performers have attempted to pursue false endorsement claims against political users.

### *B. False Endorsement Ruling in Browne: Discussion, Analysis, and What to Make of It*

Earlier, the Article devoted considerable attention to the right of publicity claim in *Browne v. McCain*.<sup>210</sup> Browne also brought a section 43(a)-based false endorsement claim against Senator McCain and the RNC<sup>211</sup> over their political ad’s use of portions of

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* Although the Ninth Circuit ruled that Waits had established everything necessary regarding his false endorsement claim, it also determined that the damages awarded by the jury on his false endorsement claim were duplicative of some of the damages awarded on his right of publicity claim. *Id.* The court therefore vacated the damages portion of the judgment on the false endorsement claim, *id.*, while upholding the damages awarded on the right of publicity claim. *Id.* at 1103–06.

<sup>208</sup> *See id.* at 1096–98 (discussing the defendants’ product-promoting commercial). The court’s holdings regarding false endorsement claims also seemed to contemplate product-promotion uses by defendants. *See id.* at 1108, 1110–11.

<sup>209</sup> *See supra* text accompanying notes 214–57.

<sup>210</sup> *Browne v. McCain*, 611 F. Supp. 2d 1062 (C.D. Cal. 2009); *see also supra* notes 67–113 and accompanying text.

<sup>211</sup> There were actually two false endorsement claims—one against each of the two defendants. The court addressed the false endorsement claim against Senator McCain in one opinion and the false endorsement claim against the RNC in a separate but substantively identical opinion issued on the same date. *See Browne v. McCain*, 611 F.



*Running on Empty* (that featured Browne's voice).<sup>212</sup> The court addressed the false endorsement claim in the context of the defendants' motion to dismiss for failure to state a claim.<sup>213</sup>

The defendants' first argument for dismissal had both statutory and constitutional features. On the statutory side, they contended that section 43(a) applies only to commercial speech and that, because their ad was political rather than commercial in nature, Browne's false endorsement claim should fail.<sup>214</sup> The court rejected that argument and pointed to decisions indicating that section 43(a) applies not only to commercial speech but also to non-commercial speech of a political nature.<sup>215</sup> The defendants fared no better when they invoked the argument's related constitutional feature by asserting that, given the political subject matter and context of the speech in which they engaged, permitting Browne's claim against them would violate the First Amendment.<sup>216</sup> As the court reminded the defendants, "the mere fact that a defendant is en-

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Supp. 2d 1073 (C.D. Cal. 2009) (addressing false endorsement claim against McCain); *Browne v. McCain*, 612 F. Supp. 2d 1125 (addressing false endorsement claim against RNC) (C.D. Cal. 2009). Both of those opinions were separate from the opinion (also issued on the same date) in which the court dealt with Browne's right of publicity claim. See *Browne*, 611 F. Supp. 2d at 1062. The Article's discussion of the false endorsement claims against the two defendants lumps the claims together because the court treated them identically. For convenience purposes, the Article provides citations primarily to the opinion dealing with the claim against Senator McCain and not to the pages setting forth identical content in the opinion dealing with the claim against the RNC.

<sup>212</sup> The key facts are summarized earlier in the Article. See *supra* text accompanying notes 67–77.

<sup>213</sup> *Browne*, 611 F. Supp. 2d 1073; *Browne*, 612 F. Supp. 2d 1125.

<sup>214</sup> *Browne*, 611 F. Supp. 2d at 1078–79.

<sup>215</sup> *Id.* at 1079. For the proposition that section 43(a)'s reach extends beyond commercial speech to political speech as well, the court cited *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86, 92–93 (2d Cir. 1997), and *MGM-Pathe Communications Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 876 (S.D.N.Y. 1991). See *Browne*, 611 F. Supp. at 1079. The cited cases indicate that certain aspects of the defendants' uses in those cases may partially distinguish them from *Browne* and the types of cases being addressed in this Article. See *infra* text accompanying notes 236–50. The *Browne* court's ruling that section 43(a) can be applied not only to commercial uses but also to political uses would seem to make the *Waits* decision relevant, given the focus in both *Waits* and *Browne* on performers' distinctive voices. For discussion of *Waits*, see *supra* text accompanying notes 193–208. However, the *Browne* court did not cite *Waits*.

<sup>216</sup> *Browne*, 611 F. Supp. 2d at 1079.

gaged in political speech, alone, does not bar a plaintiff's Lanham Act claim."<sup>217</sup>

In their second argument for dismissal, Senator McCain and the RNC again relied on the First Amendment but added a twist: This time, instead of arguing that the First Amendment bans any and all applications of section 43(a) to political speech, they argued that their ad was not only political, but also effectively an artistic work.<sup>218</sup> The artistic work argument was an attempt to convince the court to apply a test adopted by other courts in an effort to balance the plaintiff's economic interests against the defendant's free speech interests when the plaintiff seeks to invoke section 43(a) as to a use that was artistic in nature rather than clearly commercial.<sup>219</sup>

The test advocated by the *Browne* defendants originated in *Rogers v. Grimaldi*,<sup>220</sup> a case in which famous dancer and actress Ginger Rogers complained about the defendants' use of the title *Ginger and Fred* for a film.<sup>221</sup> Rogers asserted in her section 43(a) claim that the title would create a likelihood of confusion about whether she endorsed the film (she did not) and about whether the work was in part about her (it was not).<sup>222</sup> Rather than being about Rogers and her well-known dancing partner Fred Astaire, the movie presented the story of two fictional dancers called "Ginger" and "Fred."<sup>223</sup> Attempting to balance the competing interests at stake in section 43(a) cases regarding titles of artistic works,<sup>224</sup> the

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 1080.

<sup>219</sup> *See id.* A brief discussion of those cases follows in the text.

<sup>220</sup> 875 F.2d 994 (2d Cir. 1989).

<sup>221</sup> *Id.* at 996.

<sup>222</sup> *Id.* at 996-97.

<sup>223</sup> *Id.*

<sup>224</sup> The Second Circuit noted that "[m]ovies, plays, books, and songs are all indisputably works of artistic expression and deserve protection," but added that "they are also sold in the commercial marketplace like other more utilitarian products, making the danger of consumer deception a legitimate concern that warrants some government regulation." *Id.* at 997. The court then added that "[t]itles, like the artistic works they identify, are a hybrid nature, combining artistic expression and commercial promotion." *Id.* at 998. But, because work titles have a more expressive character than do names of products, "overextension of Lanham Act restrictions in the area of titles might intrude on First Amendment values." *Id.* Hence, an appropriate way of balancing the competing interests was in order. *See id.*

Second Circuit concluded that even if some likelihood of confusion existed, the First Amendment would furnish a defense against section 43(a) liability if the title was artistically relevant and not explicitly misleading.<sup>225</sup> The *Rogers* court developed this test for section 43(a) cases of the false endorsement variety. The Ninth Circuit later adopted the test in *Mattel v. MCA Records, Inc.*,<sup>226</sup> a section 43(a) case involving alleged trademark infringement.<sup>227</sup>

However, after acknowledging *Rogers* and *Mattel*, the *Browne* court declined to apply what it referred to as those decisions' *artistic relevance* test. The court noted that the defendants' ad had not been shown to be an artistic work. Moreover, it had not been demonstrated that application of the artistic relevance test to political speech would be warranted.<sup>228</sup> The court observed that under the limited review conducted at the motion-to-dismiss stage, the court "would have difficulty applying the artistic relevance test at this

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<sup>225</sup> *Id.* at 999–1000. Thus, if the title was not artistically relevant or was explicitly misleading, there could be liability under section 43(a). *See id.* Applying the test to the facts in *Rogers*, the Second Circuit concluded that the title *Ginger and Fred* was artistically relevant to the defendants' movie because in the movie's story line, the fictional dancers were referred to by those names. *Id.* at 1001. The court also concluded that, though the title might have suggested to some consumers that Rogers endorsed the movie or that it was about her, the title was not explicitly misleading. *Id.* It did not say, for instance, "The True Life Story of Ginger and Fred" (used by the court as an example of a title that would have been explicitly misleading). *Id.* at 1007. The plaintiff's false endorsement claim, therefore, failed. *Id.* at 1001. Rogers also sued on right of publicity grounds but lost on that claim as well, as the court employed an analysis that seemed to draw, for First Amendment reasons, upon the artistic relevance aspect of the above-described test for false endorsement cases. *See id.* at 1004–05. The court also indicated that because the movie was an artistic work and was not a disguised advertisement for a product or service, it was not sufficiently commercial to give rise to right of publicity liability. *Id.* Interestingly, considering the subject matter of this Article, Rogers also brought a false light publicity claim. *Id.* at 2005. The court rejected that claim in very short order, noting that the movie was not about Rogers in any way and therefore could not even arguably have depicted her in a false light. *Id.* at 1005.

<sup>226</sup> 296 F.3d 894 (9th Cir. 2002).

<sup>227</sup> *Mattel* sued MCA Records and other defendants on various theories, including trademark infringement, over the use of *Mattel's* Barbie trademark in a song that was titled "Barbie Girl." *Id.* at 899. The song contained commentary on the Barbie trademark and the familiar doll of that name. *Id.* at 898–99. Adopting and applying the *Rogers* test, the Ninth Circuit held that the defendants' references to Barbie were artistically relevant and not explicitly misleading. *Id.* at 902. Therefore, *Mattel's* trademark infringement claim failed. *Id.*

<sup>228</sup> *Browne v. McCain*, 611 F. Supp. 2d 1073, 1080 (C.D. Cal. 2009).

time.”<sup>229</sup> Therefore, the court concluded, the First Amendment did not require the court to dismiss Browne’s false endorsement claim.<sup>230</sup>

Senator McCain and the RNC also sought dismissal of Browne’s false endorsement claim because their ad clearly identified the RNC as the party responsible for the ad—a fact that they regarded as depriving Browne of any ability to prove a likelihood of confusion as to the ad’s source or origin.<sup>231</sup> The court observed, however, that even if the defendants were right and Browne could not prove likelihood of confusion as to source or origin, the ad’s identification of the RNC as its source “does not show that a consumer could not possibly be confused as to whether Browne endorsed RNC [or] Senator McCain.”<sup>232</sup> Therefore, the court declined to dismiss Browne’s claim on the basis of a supposed inability to establish likelihood of confusion.<sup>233</sup>

Because the court’s treatment of the false endorsement claim was clearly favorable to performers, plaintiffs in the types of cases addressed in this Article would logically seek to rely on *Browne* if they brought a lawsuit on false endorsement grounds. But, as noted in the analysis of *Browne*’s handling of the plaintiff’s right of publicity claim,<sup>234</sup> it is necessary to remember that the court addressed the false endorsement claim at a preliminary stage rather than issuing a ruling on the merits.<sup>235</sup> A full-scale examination of the parties’ respective arguments may or may not have led to an on-the-merits ruling in the plaintiff’s favor.

Moreover, if faced with *Browne*-like facts, other courts might not take as favorable a view of performers’ false endorsement claims against political users. In holding that section 43(a) can be applied to defendants’ political activities, the *Browne* court relied on two cases that so indicate.<sup>236</sup> Some courts, however, might find

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 1081.

<sup>233</sup> *Id.*

<sup>234</sup> See *supra* text accompanying notes 78–84, 117–20.

<sup>235</sup> See *Browne*, 611 F. Supp. 2d at 1078–81.

<sup>236</sup> *Id.* at 1079–80.

the political activities in the two cases to be different from those in *Browne*. A closer look at the cases reveals why this may be so.

In one of the two cases, *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, a political organization sued another political organization for infringement of its federally registered service mark, United We Stand America.<sup>237</sup> The plaintiff used that mark as the organization's name, and the defendant's alleged infringement consisted of using essentially the same name.<sup>238</sup> In its unsuccessful attempt to have a default judgment against it vacated,<sup>239</sup> the defendant argued that because it was engaged in political activities, it was not furnishing "services" for Lanham Act purposes and therefore should not be held liable for infringement.<sup>240</sup> The court rejected this argument, holding that the organization's campaign fundraising efforts and its activities, such as issuing press releases and preparing campaign literature, were services typically provided by a political party and affiliated organizations.<sup>241</sup> Even though these activities were "not undertaken for profit, they unquestionably [constituted] a service" for purposes of the relevant Lanham Act provision.<sup>242</sup>

However, in explaining its holding, the Second Circuit emphasized what could be seen as a factor distinguishing the case from *Browne*. According to the court, the defendant in *United We Stand America* was using the plaintiff's mark "as a source identifier" for the activities in which the defendant was engaged.<sup>243</sup> In other

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<sup>237</sup> 128 F.3d 86, 88 (2d Cir. 1997). The fact that the plaintiff was suing for infringement of a registered mark meant that the case was brought under 15 U.S.C. § 1114 (2012) (dealing with infringement of registered marks) rather than 15 U.S.C. § 1125(a) (2012) (providing a provision usually referred to as section 43(a) and the one applicable in cases involving infringement of unregistered marks). See *United We Stand Am., Inc.*, 128 F.3d at 88–89. Both Lanham Act provisions refer, however, to uses by defendants in the context of goods or services. See §§ 1114, 1125(a).

<sup>238</sup> *United We Stand Am., Inc.*, 128 F.3d at 88. Although both organizations were involved with promoting the presidential candidacy of Ross Perot, the defendant organization was formed after its leaders had disagreements with the leaders of the plaintiff organization. *Id.*

<sup>239</sup> *Id.* at 88–89, 93.

<sup>240</sup> *Id.* at 89; see § 1114.

<sup>241</sup> *United We Stand Am., Inc.*, 128 F.3d at 89–90.

<sup>242</sup> *Id.* at 90.

<sup>243</sup> *Id.* at 92.

words, the defendant was using the plaintiff's mark in a trademark-like sense. This fact helped to support the court's conclusion that the defendant was indeed engaged in services for which there could be infringement liability.<sup>244</sup>

The facts in *Browne* were different. There, the defendants were not attempting to use Browne's identity as a source identifier for themselves; rather, they arguably used Browne's identity as part of an expressive political message about the respective presidential candidates.<sup>245</sup> If faced with *Browne*-like facts, some courts could regard this difference as calling for a less expansive view of section 43(a) in false endorsement cases than the court approved in *Browne*, or as creating a need to ascribe greater weight to the defendants' First Amendment arguments than the court did in *Browne*.<sup>246</sup>

*MGM-Pathe Communications Co. v. Pink Panther Patrol*<sup>247</sup> was the other case the *Browne* court relied on in its conclusion that section 43(a) may reach political activities.<sup>248</sup> As in *United We Stand America*, the *MGM-Pathe* court's ruling that political activities may furnish the basis for infringement liability came in the factual context of a defendant organization's source-identifying use of the plaintiff's trademark.<sup>249</sup> Accordingly, for the same reasons noted

<sup>244</sup> *Id.*

<sup>245</sup> See *Browne v. McCain*, 611 F. Supp. 2d 1073, 1076–77 (C.D. Cal. 2009).

<sup>246</sup> See *id.* at 1078–81. The defendant in *United We Stand America* unsuccessfully made this very argument, contending that it was engaged in political expression. *United We Stand Am.*, 128 F.3d at 93. The court stressed, however, that the defendant was “not using the phrase ‘United We Stand America’ for an expressive purpose such as commentary, comedy, parody, news reporting or criticism.” *Id.* Instead, the defendant was using the phrase in the trademark-like sense of identifying itself as a source of services. *Id.* The court concluded, therefore, that the First Amendment did not protect the defendant against liability. *Id.*

<sup>247</sup> 774 F. Supp. 869 (S.D.N.Y. 1991).

<sup>248</sup> See *Browne*, 611 F. Supp. 2d at 1079–80.

<sup>249</sup> In *MGM-Pathe*, the owner of a federally registered trademark (The Pink Panther) alleged that the defendant organization committed trademark infringement in calling itself the Pink Panther Patrol and outfitting organization members with T-shirts setting forth the name. *MGM-Pathe*, 774 F. Supp. at 871. This meant that the relevant Lanham Act provision was 15 U.S.C. § 1114 rather than the provision commonly known as section 43(a). For discussion of the same issue in *United We Stand America*, see *supra* note 246. The organization provided a street patrol that was designed to protect gays against physical attacks and educate the public about the problem of violence against gays. *MGM-*

earlier regarding *United We Stand America*, courts faced with deciding a *Browne*-like case might see a greater need to give credence to the defendant's liability-avoidance arguments than the court did in *MGM-Pathe*.<sup>250</sup>

There is another sense in which some courts, if faced with a case similar to *Browne*, could take a different First Amendment tack than the *Browne* court did. As noted earlier, the court declined in *Browne* to apply the artistic relevance test from *Rogers v. Grimaldi*,<sup>251</sup> because the political ad run by the defendants was not an artistic work and the defendants had not shown why the test's application should be extended to the political expression context.<sup>252</sup> Even if they were inclined to agree that political ads are not artistic works, it would not be a stretch to think that some courts would regard a version of the artistic relevance test as appropriate for the *Browne*-like context. Courts could reason that if artistic works merit such a First Amendment-based test because of the substantial First Amendment protection extended to them,<sup>253</sup> the same test should also apply to political ads, given the core status of political speech in the First Amendment realm.<sup>254</sup>

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*Pathe*, 774 F. Supp. at 871. The defendant argued that it was engaged in political speech and that the First Amendment should protect it against liability because "political speech . . . is less subject to the trademark laws." *Id.* at 877. The court stated, however, that there was "no legal support for this position" and added that "[t]he seriousness and virtue of a cause do not confer any right to the use of the trademark of another." *Id.* Although the court did not state specifically that the defendant was using the plaintiff's trademark in a source-identifying sense, the case's factual context clearly so indicates. *See id.* at 871. *MGM-Pathe* and *United We Stand America* seem cut from the same cloth analytically—a conclusion reinforced by the fact that Judge Leval authored both opinions. *See United We Stand Am.*, 128 F.3d at 88 (as a Second Circuit judge); *MGM-Pathe*, 774 F. Supp. at 871 (as a district judge).

<sup>250</sup> *See supra* text accompanying notes 237–46.

<sup>251</sup> 875 F.2d 994 (2d Cir. 1989). For discussion of the artistic relevance test articulated in *Rogers*, see *supra* text accompanying notes 220–30.

<sup>252</sup> *Browne*, 611 F. Supp. 2d at 1080.

<sup>253</sup> *See supra* text accompanying notes 220–25.

<sup>254</sup> *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790–91, 799 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329, 339–40 (2010). Moreover, some courts in the Ninth Circuit might feel more of an obligation to apply the *Rogers* test than the *Browne* court did, because in *Mattel v. MCA Records, Inc.*, the Ninth Circuit adopted the *Rogers* test for purposes of a trademark infringement case in which the defendant's work was artistic in nature. 296 F.3d 894, 902 (9th Cir. 2002). For discussion of *Mattel*, see *supra* note 227.

If a court decided to apply the *Rogers* test in a *Browne*-like case, one could see the court—depending upon the facts, of course—concluding that the use of the plaintiff’s identity was relevant to the message in the political ad, and that the ad was not explicitly misleading as long as it stopped short of expressly stating that the plaintiff endorsed the candidate whom the ad was designed to promote.<sup>255</sup> Such a conclusion would mean that the defendant would not be held liable. But there would be a counterargument in a case resembling *Browne*: Even if the *song and recording* may have had some relevance to the campaign ad’s message,<sup>256</sup> the performer’s *identity*—in the form of his distinctive voice—was not relevant.<sup>257</sup>

The point here is not to make a convincing case either way for whether the artistic relevance test should be applied (or if so, how it should be applied) in cases of the sort analyzed in this Article. Instead, the considerable potential for courts to adopt differing analyses makes false endorsement a less-than-reliable theory for performers to use against users of their identities in political contexts. The next Section examines another performers’ rights case, in which that lack of reliability is further underscored.

### C. *False Endorsement Ruling in Henley: Discussion, Analysis, and What to Make of It*

In *Henley v. DeVore*,<sup>258</sup> the court came to a different conclusion than in *Browne* on a famous performer’s false endorsement claim

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<sup>255</sup> See *Rogers*, 875 F.2d at 999–1001; see also *supra* note 225 (discussing the Second Circuit’s application of the test in *Rogers*). In *Browne*, for instance, any misleading message regarding a supposed endorsement was implied rather than expressly stated. See *Browne*, 611 F. Supp. 2d at 1076–77, 1081. One would expect the same to be true in almost all political use cases of the sort addressed in this Article.

<sup>256</sup> In *Browne*, for example, *Running on Empty* (the song and the recording) may have had at least tangential relevance to the content of the defendants’ ad, which focused on the respective candidates’ energy policies. See *Browne*, 611 F. Supp. 2d at 1076–77.

<sup>257</sup> For a discussion of distinctive voice issues, see *supra* text accompanying notes 46–51, 94–96, 121–209.

<sup>258</sup> 733 F. Supp. 2d 1144 (C.D. Cal. 2010). Both *Henley* and *Browne* were decided by the U.S. District Court for the Central District of California, though different judges issued the decisions. *Id.* at 1147 (Selna, J.); *Browne*, 611 F. Supp. 2d at 1075 (Klausner, J.).



against defendants engaged in political activities.<sup>259</sup> Don Henley, of the Eagles and solo career fame, sued Charles DeVore and other defendants associated with DeVore's campaign for the Republican nomination for a U.S. Senate seat from California.<sup>260</sup> Henley based his false endorsement claim on the defendants' use, in campaign ads and videos, of altered portions of two hit songs that Henley had recorded.<sup>261</sup> In the ads and videos, the defendants changed the lyrics of the two songs in order to engage in commentary on Democratic political figures and promote DeVore's candidacy. As a result, the song *The Boys of Summer* became "The Hope of November" and the song *All She Wants to Do Is Dance* became "All She Wants to Do Is Tax."<sup>262</sup>

The court considered Henley's false endorsement claim in the context of the defendants' motion for summary judgment.<sup>263</sup> It began the analysis by noting that, in *Waits v. Frito-Lay, Inc.*,<sup>264</sup> the Ninth Circuit recognized a false endorsement claim under section

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<sup>259</sup> Compare *Henley*, 733 F. Supp. 2d at 1169 (granting summary judgment in favor of defendants on plaintiff's false endorsement claim), with *Browne*, 611 F. Supp. 2d at 1081 (permitting plaintiff's false endorsement claim to go forward).

<sup>260</sup> *Henley*, 733 F. Supp. 2d at 1147.

<sup>261</sup> *Id.* at 1147-49. In the ads and videos, a vocalist sought to "simulate[] [Henley's] musical and vocal performances." *Id.* at 1168-69.

<sup>262</sup> *Id.* at 1148-49. There were other plaintiffs in the case, but Henley was the only one who brought a false endorsement claim. Because Henley co-wrote *The Boys of Summer* along with Mike Campbell, the two of them co-owned the copyright on the song. *Id.* at 1147. Accordingly, Henley and Campbell brought a copyright infringement claim against DeVore and the other defendants. *Id.* at 1147-49. Henley did not participate in the writing of "All She Wants to Do Is Dance," so he had no copyright interest to enforce regarding it. That song's writer and copyright owner, Danny Kortchmar, brought a copyright infringement claim against the defendants. *Id.* at 1148-49. The court addressed the copyright infringement claims together. *See id.* at 1149. Given the defendants' clear borrowing from the copyrighted songs, *see id.* at 1150, the court focused on whether the defendants were entitled to the protection of the fair use defense. *Id.* at 1150-66. In a lengthy analysis, the court concluded that the defendants' borrowings did not constitute fair use and that the plaintiffs were entitled to summary judgment on their copyright infringement claims. *Id.* Because copyright infringement issues are beyond the scope of this Article, more detailed discussion of the court's analysis of those claims will not be included here.

<sup>263</sup> *Id.* at 1149, 1169. Earlier in the proceedings, the court had denied the defendants' motion to dismiss because, though the court considered it a "close question," Henley's allegations were sufficient to state a claim under section 43(a). *Id.* at 1167.

<sup>264</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

43(a) “for a vocal imitation of an individual.”<sup>265</sup> The court read *Waits* as establishing that, in order to win such a case, the plaintiff must prove a likelihood of confusion “as to whether the individual actually sang in the advertisement.”<sup>266</sup> Although the Ninth Circuit made such a statement in *Waits*, it did so in the context of approving a particular jury instruction the district court had given.<sup>267</sup> The context and thrust of the *Waits* decision, however, suggests that the court was not ruling out the possibility of false endorsement liability, even if consumers did not think the defendant actually sang in the commercial—as long as there was other evidence that falsely suggested the plaintiff’s endorsement of the defendant’s product and created a likelihood of confusion in that regard.<sup>268</sup> The *Henley* court, therefore, may have read *Waits* more narrowly than it should have.

Continuing to insist that Henley’s false endorsement claim could not succeed without proof of a likelihood that consumers would think Henley actually performed in the ads and videos, the court observed that given the vocalist’s “less-than-angelic voice in comparison with Henley’s more soothing vocals,” no reasonable jury could find a likelihood of confusion.<sup>269</sup> Henley submitted evidence potentially suggesting that consumers could reach the erroneous conclusion that he endorsed DeVore or approved the ads and videos, but the court rejected the evidence as “not . . . probative of whether people would reasonably think that Henley actually performed the music in the [ads and] videos, which is *the relevant question* under *Waits*.”<sup>270</sup> This narrow reading of *Waits* was a key

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<sup>265</sup> *Henley*, 733 F. Supp. 2d at 1166; see *Waits*, 978 F.2d at 1107. For discussion of the false endorsement claim in *Waits*, see *supra* text accompanying notes 193–208. For discussion of the right of publicity claim in that case, see *supra* note 50.

<sup>266</sup> *Henley*, 733 F. Supp. 2d at 1166.

<sup>267</sup> See *Waits*, 978 F.2d at 1110–11.

<sup>268</sup> See *id.* at 1106–07, 1110–11.

<sup>269</sup> *Henley*, 733 F. Supp. 2d at 1168.

<sup>270</sup> *Id.* at 1169 (emphasis added). As the earlier discussion suggests, the question of likelihood of confusion about whether Henley actually sang was a potentially relevant consideration, but not *the* (as in *only*) relevant question for purposes of possible false endorsement liability. See *supra* text accompanying notes 263–68.

factor in the court's decision to grant the defendants summary judgment on Henley's false endorsement claim.<sup>271</sup>

Another factor played a key role in the *Henley* court's decision to grant summary judgment to the defendants: reliance on the Second Circuit decision in *Oliveira v. Frito-Lay, Inc.*<sup>272</sup> In *Henley*, the court interpreted *Oliveira* as establishing that a singer cannot base a false endorsement claim on a defendant's advertisement that used a recording in which the singer's performance was captured.<sup>273</sup> The court conceded in *Henley* that *Oliveira* was not a binding precedent because it was a Second Circuit (rather than Ninth Circuit) decision, but the court found it to be persuasive.<sup>274</sup> However, the *Henley* court's faulty understanding of *Oliveira* caused the court to give *Oliveira* more sweeping effect than was warranted. A brief look at *Oliveira* shows why.

The plaintiff in *Oliveira* was Astrud Gilberto, the singer on the 1964 hit recording of the song *The Girl from Ipanema*.<sup>275</sup> In an amended complaint, Gilberto alleged that she had an unregistered trademark in her performance of the song, as captured in the recording, by virtue of the public's strong association of the song and recording with her.<sup>276</sup> She further alleged that the defendants infringed this unregistered trademark, and therefore violated section 43(a) of the Lanham Act, by using the 1964 recording in a humor-

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<sup>271</sup> *Henley*, 733 F. Supp. 2d at 1169. One might think that a court inclined to read *Waits* narrowly could easily have found an additional way in which to limit the decision's effect: by pointing out that *Waits* involved a clearly commercial use, whereas *Henley* involved a political use. However, the court engaged in no such discussion.

<sup>272</sup> 251 F.3d 56 (2d Cir. 2001); see *Henley*, 733 F. Supp. 2d at 1166–69.

<sup>273</sup> *Henley*, 733 F. Supp. 2d at 1166–68.

<sup>274</sup> *Id.* at 1168.

<sup>275</sup> *Oliveira*, 251 F.3d at 57–59. The plaintiff's name was actually Astrud Oliveira, but she was known professionally as Astrud Gilberto. *Id.* at 57. The Second Circuit referred to her by her professional name in the text of its opinion. The same will be done herein.

<sup>276</sup> *Id.* at 59–61. Gilberto did not own the copyright on the song. See *id.* at 58. Because it was a 1964 recording, it predated the 1972 enactment that extended copyright protection to recordings. *Id.* at 64 n.2. Gilberto, who won a Grammy Award for the performance captured in the recording, *id.* at 59, contended that “the song is her signature piece and the centerpiece of all her concert appearances, that the public associates her performance of [the song] with her, and that she bills herself as ‘The Girl from Ipanema’ and operates an instructional website under that name.” *Id.* at 61.

ous television commercial for Frito-Lay's Baked Lays potato chips.<sup>277</sup>

An earlier version of Gilberto's complaint included a false endorsement claim under section 43(a), but that claim was replaced with the trademark infringement claim in the relevant amended complaint.<sup>278</sup> This change was important to the Second Circuit's analysis and to a proper understanding of the decision. The district court granted the defendants' motion to dismiss Gilberto's section 43(a) claim because, in the court's view, no reasonable jury could find that the defendants' commercial implied an endorsement by Gilberto of Frito-Lay's product.<sup>279</sup> However, the Second Circuit pointed out that, because the plaintiff's amended complaint had recast her section 43(a) claim as a trademark infringement claim rather than an implied endorsement claim, the district court's reasoning was insufficiently related to the claim that was actually before the court.<sup>280</sup> The Second Circuit nevertheless affirmed the district court's dismissal of the plaintiff's section 43(a) claim, but did so on another ground. The court observed that, even though a musical work protected by copyright may also serve as a trademark for an advertiser's product, service, or business,<sup>281</sup> a musical work cannot serve as a trademark *for itself*.<sup>282</sup> This recognition led the court to conclude: "For similar reasons . . . that, at least upon the showing made by Gilberto, the law does not accord her trademark rights in the recording of her signature performance."<sup>283</sup> Therefore, the Second Circuit dismissed Gilberto's claim.<sup>284</sup>

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<sup>277</sup> *Id.* at 58–61. In the commercial, the recording of "The Girl from Ipanema" played in the background as famous models were shown lounging by a swimming pool. As the camera panned across the group of models, each one looked disappointed to have been passed an empty bag of Baked Lays. The camera then moved to show the Miss Piggy character, who was also lounging by the pool and was revealed to be the passer of the empty bags. Miss Piggy then interrupted with a statement meant to keep the voice-over announcer from completing a joke about not eating like a pig. *Id.* at 58.

<sup>278</sup> *Id.* at 59–60.

<sup>279</sup> *Id.* at 60.

<sup>280</sup> *Id.* at 60–61.

<sup>281</sup> *Id.* at 61–62 & n.1.

<sup>282</sup> *Id.* at 62.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 63.

As noted above, the *Henley* court treated *Oliveira* as barring singers from basing false endorsement claims on defendants' advertisements that involved the use of recordings in which the singers' performances were captured.<sup>285</sup> But a close reading of *Oliveira* reveals that the decision did not prohibit all such false endorsement claims. The Second Circuit suggested in *Oliveira* that if it had ruled on a false endorsement claim rather than the trademark infringement claim, the court might have agreed with the district court that, on the facts of the case, no reasonable jury could find an implied endorsement.<sup>286</sup> This statement—geared toward the case's factual context<sup>287</sup>—stopped short of a flat ban on false endorsement claims when the defendant used a recording that captured the plaintiff's performance of a musical work.<sup>288</sup> The actual ruling in *Oliveira* almost certainly makes such false endorsement claims challenging to win, but it does not eliminate the prospect that, on the right set of facts, a performer could prevail.<sup>289</sup>

Although the *Henley* court's too-narrow reading of *Waits*<sup>290</sup> and too-broad reading of *Oliveira*<sup>291</sup> appear to have been key factors in

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<sup>285</sup> *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1166–68 (C.D. Cal. 2010).

<sup>286</sup> *See Oliveira*, 251 F.3d at 60.

<sup>287</sup> The factual context included the previously noted humorous content of the ad and its use of the Miss Piggy character—matters potentially lessening the likelihood that consumers would think Gilberto was endorsing Baked Lays. *See supra* note 277.

<sup>288</sup> Moreover, the court cited *Waits* and other cases in which false endorsement claims succeeded because the plaintiff's "persona" had been used without his or her consent. *Oliveira*, 251 F.3d at 62. Even though the court did not regard the *Oliveira* facts as presenting a taking of Gilberto's persona, the court's citation of successful false endorsement cases suggests that such claims can be made out in appropriate factual contexts. *See id.*

<sup>289</sup> *See id.* at 62–63. For instance, if the ad in *Oliveira* had had a less humorous tone and, besides using the recording of the song, had expressly assigned the name "The Girl from Ipanema" to an actress who appeared in the ad, an arguably credible false endorsement claim might have been stated. *See Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1059 (C.D. Cal. 2004) (following *Oliveira* on arguably similar facts, but suggesting that potential for successful false endorsement claim could exist in a scenario of sort offered in this footnote); *see also* *Beastie Boys v. Monster Energy Co.*, 66 F. Supp. 3d 424, 453–54 (S.D.N.Y. 2014) (concluding that *Oliveira* does not bar a false endorsement claim where defendant's advertisement used not only a recording featuring voices of members of plaintiff musical group, but also various other indicators suggesting endorsement by members of that group).

<sup>290</sup> *See supra* text accompanying notes 263–70.

<sup>291</sup> *See supra* text accompanying notes 272–89.

the court's conclusion that the defendants were entitled to summary judgment on the plaintiff's false endorsement claim, it is possible that the court might have come to the same conclusion even if it had properly applied those decisions. To win, Henley would have needed to prove a likelihood of confusion as to whether he was endorsing DeVore's candidacy for elective office.<sup>292</sup> Doing so might have been difficult, given the apparently limited imitation skills of the singer in the ads and videos and the obvious, perhaps silly seeming, alterations of the lyrics of the relevant songs.<sup>293</sup> But it is also possible that, absent the problematic readings of *Waits* and *Oliveira*, the *Henley* court might have concluded that there was at least a jury question on the likelihood of confusion issue.

In the end, *Henley* offers further evidence that courts have disagreed over the proper handling of false endorsement cases that focus on uses of performers' voices and other indicia of their identity.<sup>294</sup> Add those disagreements to uncertainty over how to account for First Amendment interests when the uses were political in nature,<sup>295</sup> and the false endorsement theory becomes one that performers cannot count on as a consistent basis for obtaining legal relief against political users. There is a need for a different theory—one that lessens the potential for the disagreements and uncertainty noted. The Article now turns to such a theory: the seemingly forgotten tort of false light publicity.

### III. FALSE LIGHT PUBLICITY: ORIGINS, ELEMENTS, AND APPLICATIONS

#### *A. Origins and Development of False Light Publicity as a Tort Theory*

In their groundbreaking 1890 article, Samuel Warren and Louis Brandeis proposed a theoretical framework for recognizing and protecting privacy interests under the law.<sup>296</sup> Today's tort claims for invasion of privacy rest, to a considerable extent, on the founda-

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<sup>292</sup> See *Browne v. McCain*, 611 F. Supp. 2d 1073, 1080–81 (C.D. Cal. 2009).

<sup>293</sup> See *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1148–49, 1168–69 (C.D. Cal. 2010).

<sup>294</sup> See *supra* text accompanying notes 263–89.

<sup>295</sup> See *supra* text accompanying notes 214–57.

<sup>296</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

tion laid by Warren and Brandeis.<sup>297</sup> After invasion of privacy claims traveled a not-always-consistent path through the courts during the ensuing decades,<sup>298</sup> William Prosser authored a highly influential 1960 article in which he built upon the work of Warren and Brandeis, considered the body of court decisions in invasion of privacy cases, and classified invasion of privacy claims into particular categories.<sup>299</sup> The Prosser catalogue consisted of four types of invasion of privacy claims: (1) intrusion upon a person's solitude or into his private affairs; (2) public disclosure of private facts; (3) commercial appropriation of name or likeness; (4) and publicity that places a person in a false light in the eyes of the public (or, as this variety of claim is usually called, *false light publicity*).<sup>300</sup>

Commentators have suggested that, in identifying the first three types of invasion of privacy claims, Prosser found roots in the Warren and Brandeis proposal and some of the later emerging cases, but Prosser took more of a leap when he identified the false light publicity category.<sup>301</sup> Regardless of whether Prosser effectively gave birth to the false light publicity tort,<sup>302</sup> or nurtured what was already there in the law, his article had considerable impact. In relatively short order, courts and legislatures began adopting the four-category approach to invasion of privacy claims.<sup>303</sup> Prosser's article and the developments in courts and legislatures clearly influenced the invasion of privacy provisions in the Restatement (Second) of Torts (the "Restatement").<sup>304</sup> In section 652A, the Restatement

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<sup>297</sup> Richards & Solove, *supra* note 30, at 1888.

<sup>298</sup> See Richards & Solove, *supra* note 30, at 1894; Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2008, 2012 (2010).

<sup>299</sup> Prosser, *supra* note 29; see Richards & Solove, *supra* note 30, at 1888-90; Strahilevitz, *supra* note 298, at 2009, 2012.

<sup>300</sup> Prosser, *supra* note 29, at 389.

<sup>301</sup> J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 783, 788-89 (1992); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364, 366 (1989); Andrew Osorio, Note, *Twilight: The Fading of False Light Invasion of Privacy*, 66 N.Y.U. ANN. SURV. AM. L. 173, 183 (2010).

<sup>302</sup> See Kelso, *supra* note 301, at 783, 788-89; Zimmerman, *supra* note 301, at 366.

<sup>303</sup> Kelso, *supra* note 301, at 783, 787; Richards & Solove, *supra* note 30, at 1889, 1903-04; Zimmerman, *supra* note 301, at 366.

<sup>304</sup> Richards & Solove, *supra* note 30, at 1890; Nat Stern, *Creating a New Tort for Wrongful Misrepresentation of Character*, 53 KAN. L. REV. 81, 88 (2004).

lists the four types of invasion of privacy in a manner that largely tracks the Prosser approach.<sup>305</sup>

What might be termed as the false light publicity theory's hey-day stemmed from a combination of the Prosser article in 1960, early judicial and legislative receptivity to Prosser's four-category approach, and the Restatement's treatment of invasion of privacy in the late 1970s.<sup>306</sup> The vast majority of states opted to recognize the four types of invasion of privacy, including false light publicity, as potentially viable causes of action.<sup>307</sup> In later years, however, commentators sometimes criticized the false light publicity theory, with its potential for overlap with defamation among the key reasons for the criticism.<sup>308</sup> As the profile of the false light publicity theory seemingly became less prominent than that of other forms of invasion of privacy, courts sometimes refused to recognize false light publicity as a valid claim.<sup>309</sup> But those occasions were rare. Most states still recognize false light publicity as a viable cause of action, if the necessary elements are proven.<sup>310</sup>

The false light publicity elements that courts or legislatures typically require are set forth in section 652E of the Restatement.<sup>311</sup> The section reads:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if  
 (a) the false light in which the other was placed would be highly offensive to a reasonable person,  
 and

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<sup>305</sup> RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977); see Prosser, *supra* note 29, at 389. Later sections of the Restatement flesh out each of the four types. See RESTATEMENT (SECOND) OF TORTS §§ 652B–652E.

<sup>306</sup> See Stern, *supra* note 304, at 88.

<sup>307</sup> Richards & Solove, *supra* note 30, at 1903–04.

<sup>308</sup> See Kelso, *supra* note 301, at 783, 788, 886; Stern, *supra* note 304, at 89; Zimmerman, *supra* note 301, at 369, 451–52.

<sup>309</sup> Kelso, *supra* note 301, at 783; Stern, *supra* note 304, at 89.

<sup>310</sup> *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1134 (7th Cir. 1985).

<sup>311</sup> RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977); see, e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1082 (9th Cir. 2002); *Douglass*, 769 F.2d at 1133–38; *Roe v. Amazon.com*, 170 F. Supp. 3d 1028, 1034–35 (S.D. Ohio 2016).



(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.<sup>312</sup>

Section 652E's preliminary language and subsection (a) establish three elements: publicity of a matter about the plaintiff; placement of the plaintiff in a false light; and the highly offensive nature of the false light, as measured by the reasonable person standard.<sup>313</sup> Those elements are referred to in the discussion below as the *common law elements*. Section 652E(b) adds a further element that must also be satisfied: a First Amendment-based fault requirement that the Supreme Court enunciated for false light publicity cases in a 1967 decision.<sup>314</sup>

### B. Common Law Elements of False Light Publicity

The first common law element, publicity of a matter about the plaintiff, differs from defamation in one important respect but resembles it in other ways. The *publicity* necessary for a valid false light publicity claim exists only if the defendant gave widespread publicity to the matter in question.<sup>315</sup> This means communication to a large audience<sup>316</sup>—something far greater than what the *publication* element of a defamation claim requires. In defamation cases, the publication element is satisfied if the defendant communicated the statement at issue to at least one person other than the plaintiff.<sup>317</sup> However, false light publicity and defamation share the common-sense requirement that what the defendant communicated must have been about the plaintiff.<sup>318</sup>

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<sup>312</sup> RESTATEMENT (SECOND) OF TORTS § 652E.

<sup>313</sup> *Id.*

<sup>314</sup> See *infra* text accompanying notes 367–72.

<sup>315</sup> *Douglass*, 769 F.2d at 1133.

<sup>316</sup> *Id.*

<sup>317</sup> ROBERT D. SACK, SACK ON DEFAMATION § 2.5.1 (3d ed. 2005).

<sup>318</sup> See RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977) (describing false light publicity's corresponding element); SACK, *supra* note 317, § 2.9 (discussing defamation's "of and concerning" requirement); see also *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) (finding plaintiff cannot have been portrayed in false light if defendant did not portray plaintiff at all).

Section 652E's requirement of publicity regarding a "matter concerning" the plaintiff calls for consideration of what constitutes a publicized "matter." An express statement, of course, logically constitutes a "matter"<sup>319</sup> in the same sense that defamation cases usually depend upon an express falsehood.<sup>320</sup> Importantly, however, the publicized "matter" for purposes of a false light publicity claim may be an implication created by the content and context of what was communicated.<sup>321</sup> For instance, there are various false light publicity cases in which a defendant used photos of a clothed plaintiff, without the plaintiff's consent, in or on the cover of a magazine that features nude pictures or erotic content. In these instances (and similar ones), courts have held that the use of the photos falsely implied that the plaintiff agreed to the use of the photos and was the sort of person who would voluntarily associate himself or herself with such a magazine.<sup>322</sup>

The implied nature of the "matter" publicized regarding the plaintiff carries over into the element that requires placement of the plaintiff in a false light.<sup>323</sup> Key questions here include whether there is an implication that the plaintiff took an action she did not take, holds a belief she does not hold, or has a history or nature she does not have.<sup>324</sup> Consider again the types of cases noted in the previous paragraph, because they serve as examples not only of implied messages but also of the false light element. For instance, in *Solano v. Playgirl, Inc.*, the Ninth Circuit held that the district court

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<sup>319</sup> See, e.g., *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249, 1250 (9th Cir. 1997) (regarding false statement that had been given in "exclusive" interview); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1089 (5th Cir. 1984) (concerning false statement that plaintiff had a certain fantasy).

<sup>320</sup> SACK, *supra* note 317, § 2.4.5. However, defamation liability also may extend to what an express statement falsely implies. *Id.*

<sup>321</sup> See, e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1083–84 (9th Cir. 2002).

<sup>322</sup> *Id.*; *Braun v. Flynt*, 726 F.2d 245, 247–49, 253–54 (5th Cir. 1984); see *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1135–36 (7th Cir. 1985) (concerning nude photos that appeared with consent of actress in certain magazine republished without her consent in magazine that was much more graphic in its typical content); *Wood*, 736 F.2d at 1086–87 (regarding private photo of plaintiff sent without her permission to magazine and published therein); *Roe v. Amazon.com*, 170 F. Supp. 3d 1028, at 1030, 1034–35 (S.D. Ohio 2016) (involving use of photo on cover of book with erotic content).

<sup>323</sup> Of course, the absence of a false light dooms the plaintiff's claim. See, e.g., *Carson v. Palombo*, 18 N.E.3d 1036, 1048–49 (Ind. Ct. App. 2014).

<sup>324</sup> See RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (AM. LAW INST. 1977).

erroneously granted summary judgment in favor of the defendant, which published *Playgirl* magazine.<sup>325</sup> The court held that *Baywatch* actor Jose Solano, Jr., who was pictured bare-chested, but otherwise clothed, on the cover of a *Playgirl* issue, had demonstrated the existence of a jury question as to whether he had been depicted in a false light.<sup>326</sup> The Ninth Circuit agreed with Solano's argument that when considered in the context of a magazine whose content featured nude photos (some of which were graphic in nature), and whose cover contained suggestive language, the placement of Solano's photo on the cover could reasonably be seen as conveying the false impression that he had posed nude for the magazine or had otherwise willingly associated himself with the magazine.<sup>327</sup> The court went on to note that "a jury reasonably could conclude that the *Playgirl* cover conveyed the message that Solano was not the wholesome person he claimed to be, that he was willing to—or was 'washed up' and had to—sell himself naked" to the magazine.<sup>328</sup>

False light depictions have been recognized in a range of other settings. For example, in *Eastwood v. National Enquirer, Inc.*, the Ninth Circuit upheld a jury verdict in favor of famous actor and movie director Clint Eastwood regarding a *National Enquirer* issue that labeled a supposed interview with Eastwood about his private life as an "exclusive."<sup>329</sup> The defendant contended that it had obtained the text of an interview of Eastwood from a freelance writer, but Eastwood maintained that no interview had taken place.<sup>330</sup> In the Ninth Circuit's view, the relevant false light arose from two foundational matters: the untrue indication that Eastwood had given an interview to the *Enquirer* (regardless of whether he had or had not given an interview to someone); and the untrue statement that the supposed interview was *exclusive*.<sup>331</sup> Given Eastwood's usual reputation for taking measures to protect his privacy, his fans

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<sup>325</sup> 292 F.3d 1078, 1081 (9th Cir. 2002).

<sup>326</sup> *Id.* at 1080–84.

<sup>327</sup> *Id.* at 1082.

<sup>328</sup> *Id.* at 1084; see similar cases cited *supra* note 322.

<sup>329</sup> 123 F.3d 1249, 1255–57 (9th Cir. 1997).

<sup>330</sup> *Id.* at 1253–55.

<sup>331</sup> *Id.* at 1255.

might have considered him a hypocrite for providing an exclusive interview about his private life to a “sensationalist tabloid.”<sup>332</sup>

Two cases decided by the Supreme Court provide additional examples of depictions that may cast a false light for liability purposes. In *Time, Inc. v. Hill*, a magazine article characterized a play as the reenactment of the James Hill family’s experience in being held hostage by escaped convicts.<sup>333</sup> Rather than being a reenactment, however, the play was at most a fictionalized story inspired by some of the real events.<sup>334</sup> The Hill family’s experience was widely reported shortly after it occurred, but the family had sought to maintain its privacy during the three years between their experience and the publication of the magazine article about the play.<sup>335</sup> Certain events and actions that occurred in the play—such as the family members fighting back against the captors and being subjected to physical violence inflicted by the captors—did not square with the actual facts, and thus depicted the family members in a false light.<sup>336</sup>

*Cantrell v. Forest City Publishing Co.* serves as a similar example.<sup>337</sup> In *Cantrell*, a newspaper ran an article that followed up on a bridge collapse that occurred several months earlier.<sup>338</sup> The article focused on the aftermath for a family following the death of a father in the bridge collapse.<sup>339</sup> Although the mother was not present

<sup>332</sup> *Id.* at 1250, 1255–56. There was also a “washed-up” concern of the sort present in *Solano*. *Id.* at 1256; see also *supra* text accompanying notes 325–28. In upholding the damages awarded by the jury to Eastwood, the Ninth Circuit noted that the jury could have thought Eastwood’s fans would think he was “essentially washed up as a movie star if he was courting publicity in a sensationalist tabloid.” *Eastwood*, 123 F.3d at 1256. Later in the Article, damages issues in false light publicity cases will be considered briefly. See *infra* text accompanying notes 354–57, 420–21.

<sup>333</sup> 385 U.S. 374, 378 (1967).

<sup>334</sup> *Id.* at 379.

<sup>335</sup> *Id.* at 377–79.

<sup>336</sup> *Id.* at 378–79. The family members won their false light publicity case in the New York courts. *Id.* at 379. The U.S. Supreme Court reversed and remanded, though not on the basis of the common law elements of false light publicity. Rather, the Court used the case to engraft a First Amendment-based fault requirement on the previously existing elements of false light publicity. See *id.* at 387–97. For discussion of this aspect of *Hill*, see *infra* text accompanying notes 367–72.

<sup>337</sup> 419 U.S. 245 (1974).

<sup>338</sup> *Id.* at 246–47.

<sup>339</sup> *Id.*

when the reporter who wrote the article visited the family's home, the article described her as "wear[ing] the same mask of non-expression she wore at the funeral" and as being too proud to accept offers of help despite the family's poverty.<sup>340</sup> The article also contained inaccurate details about the family's poverty and the supposedly dilapidated condition of the family's home.<sup>341</sup> The requisite false light for liability purposes, therefore, was present.<sup>342</sup>

With defamation and false light publicity both requiring proof of a falsehood regarding the plaintiff, the line between the two torts is not always clear.<sup>343</sup> Falsehoods that malign the plaintiff by indicating that he is dishonest, is incompetent in his profession or business, or has a bad moral character affect the plaintiff's reputation and represent the type of statement at issue in a defamation case.<sup>344</sup> Some of the express or implied messages in false light cases tend to be similar in argued or likely effect.<sup>345</sup> As a result, it is not unusual for a plaintiff to plead defamation and false light publicity as alternative theories.<sup>346</sup>

However, statements that do not bear upon the plaintiff's reputation—and therefore do not give rise to a valid defamation claim—may still be actionable on false light publicity grounds.<sup>347</sup> Consider again the facts in the *Eastwood*, *Hill*, and *Cantrell* cases. In none of those cases would the falsehoods have tended to harm the plaintiff's reputation. Nevertheless, the respective plaintiffs

<sup>340</sup> *Id.* at 248.

<sup>341</sup> *Id.* at 247–48.

<sup>342</sup> *Id.* The family members had been made "the objects of pity and ridicule." *Id.* A federal district court jury returned a verdict in favor of the family, *id.* at 246–47, but the Sixth Circuit reversed on First Amendment grounds. *Id.* at 247. The Supreme Court, however, reversed and remanded after concluding that the relevant First Amendment-based false requirement had been established. *Id.* at 251–54. For discussion of that aspect of the case, see *infra* text accompanying notes 383–89.

<sup>343</sup> This is among the reasons why some commentators have criticized the false light publicity theory. See *supra* text accompanying note 308.

<sup>344</sup> See SACK, *supra* note 317, § 2.4.1.

<sup>345</sup> See, e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1083–84 (9th Cir. 2002).

<sup>346</sup> See, e.g., *Braun v. Flynt*, 726 F.2d 245, 247 (5th Cir. 1984); *Mallory v. S&S Publishers*, 168 F. Supp. 3d 760, 765, 775–76 (E.D. Pa. 2016); *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 461, 466, 510–11 (E.D. Pa. 2010).

<sup>347</sup> See *Time, Inc. v. Hill*, 385 U.S. 374, 378–79 (1967); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1134 (7th Cir. 1985); RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (AM. LAW INST. 1977).

were depicted in a false light.<sup>348</sup> As a related matter, defamation and false light publicity also differ in terms of the harms they are designed to guard against and the damages that may be awarded.<sup>349</sup>

The plaintiff who proves that she was depicted in a false light must also prove that the false light would be highly offensive to a reasonable person.<sup>350</sup> This requirement focuses on whether “the plaintiff, as a reasonable [person], would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity.”<sup>351</sup> A trivial annoyance will not suffice.<sup>352</sup> Whether the required degree of offensiveness is present is necessarily a fact-specific inquiry, but if the required false light depiction is demonstrated, courts seem inclined to conclude that the false light would be highly offensive.<sup>353</sup>

The requirement that the necessary false light also must have been highly offensive carries over into consideration of the types of harm contemplated by this basis for legal relief. Whereas defamation law focuses on actual or likely harm to the plaintiff’s reputation for honesty, moral character, and professional competence,<sup>354</sup> the plaintiff in a false light publicity case need not prove such reputational harm.<sup>355</sup> The relevant harms in false light publicity cases involve mental suffering, such as embarrassment, humiliation, con-

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<sup>348</sup> See *supra* notes 337–42 and accompanying text.

<sup>349</sup> See *infra* notes 354–57 and accompanying text.

<sup>350</sup> RESTATEMENT (SECOND) OF TORTS § 652E.

<sup>351</sup> *Id.* cmt. c; accord *Roe v. Amazon.com*, 170 F. Supp. 3d 1028, 1035 (S.D. Ohio 2016); *Mallory*, 168 F. Supp. 3d at 776.

<sup>352</sup> See RESTATEMENT (SECOND) OF TORTS § 652E cmt. c.

<sup>353</sup> See *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1083–84 (9th Cir. 2002) (depicting plaintiff as “not the wholesome person he claimed to be”); *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1256 (9th Cir. 1997) (creating impression that plaintiff was a hypocrite); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1135 (7th Cir. 1985) (depicting plaintiff in “degrading” context); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1089 (5th Cir. 1984) (using plaintiff’s picture in “coarse” publication); *Braun v. Flynt*, 726 F.2d 245, 256 (5th Cir. 1984) (causing plaintiff to experience “personal humiliation, extreme embarrassment, and shock”); *Roe*, 170 F. Supp. 3d at 1035 (causing plaintiff to experience “humiliation, embarrassment, and ridicule”); *Judge v. Saltz Plastic Surgery*, 330 P.3d 126, 132 (Utah App. 2014) (casting doubt on plaintiff’s “professionalism and good judgment”).

<sup>354</sup> See SACK, *supra* note 317, § 2.4.1.

<sup>355</sup> See *Time, Inc. v. Hill*, 385 U.S. 374, 386 n.9 (1967); RESTATEMENT (SECOND) OF TORTS § 652E cmt. b.

cern about ridicule, and other emotional distress.<sup>356</sup> In targeting these harms, the false light publicity theory recognizes that even if a plaintiff did not experience reputational harm, she may still experience injury as a result of being characterized or depicted in certain inaccurate ways and should therefore be entitled to pursue an appropriate award of damages.<sup>357</sup>

### C. First Amendment-Based Element of False Light Publicity

The Restatement's section on false light publicity calls for the plaintiff to prove not only the elements discussed above, but also that the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed."<sup>358</sup> This First Amendment-based requirement stems from the 1967 Supreme Court decision in *Time, Inc. v. Hill*.<sup>359</sup> To understand *Hill*, it is necessary to backtrack and consider the Court's landmark decision in *New York Times Co. v. Sullivan*.<sup>360</sup>

In *New York Times*, the Court was confronted with the prospect that the existing strict-liability nature of the common law of defamation could severely chill the exercise of First Amendment rights to engage in political speech and other expression on public issues.<sup>361</sup> The Court concluded, therefore, that a public official who brings a defamation case must prove the common law elements of defamation plus a First Amendment-based fault requirement.<sup>362</sup> The Court attached the name "actual malice" to this fault re-

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<sup>356</sup> See *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 248 (1974); *Hill*, 385 U.S. at 386 n.9; see also cases cited *supra* note 353 (illustrating types of harms for which damages may be awarded in false light publicity cases).

<sup>357</sup> See *Douglass*, 769 F.2d at 1134–35. Discussion of particular dollar amounts of damage awards is beyond the scope of this Article.

<sup>358</sup> RESTATEMENT (SECOND) OF TORTS § 652E.

<sup>359</sup> 385 U.S. 374 (1967).

<sup>360</sup> 376 U.S. 254 (1964).

<sup>361</sup> *Id.* at 256, 261–64, 267–71. The falsehoods at issue were inaccuracies in statements ostensibly about a police commissioner by persons who were active in the civil rights movement. See *id.* at 256–59. For an extensive discussion and analysis of *New York Times* and other Supreme Court decisions dealing with the First Amendment aspects of defamation, see Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 95–140 (1987).

<sup>362</sup> *N.Y. Times*, 376 U.S. at 270–72, 278–80.

quirement and defined it as necessitating proof that the defendant made the statement giving rise to the case with knowledge of the statement's falsity or with reckless disregard for its truth or falsity.<sup>363</sup> A defendant's mere negligence—in the sense of failing to use reasonable care in checking out the truth or falsity of the statement—would fall short of actual malice,<sup>364</sup> and would therefore be insufficient to enable the public official plaintiff to prevail in the defamation case.<sup>365</sup> The actual malice requirement, the Court explained in *New York Times*, would provide the necessary “breathing space” for speakers and writers to engage in expression regarding public officials without risking potentially sweeping liability.<sup>366</sup>

Three years after *New York Times*, the Court was faced in *Hill* with determining whether the First Amendment should be regarded as placing limits on false light publicity cases.<sup>367</sup> The Court observed that First Amendment interests “are not the [exclusive] preserve of political expression or comment upon public affairs, essential as those are to healthy government,” and that “[o]ne need only pick up any newspaper or magazine to comprehend the

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<sup>363</sup> *Id.* at 280. The Court thus gave a special meaning to the term *actual malice*, defining it differently from so-called common law malice (which focused on ill will, spite motives, and intent to harm). See *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 251–52 (1974) (discussing the difference between actual malice as defined by the Supreme Court and common law malice). As an additional First Amendment-based safeguard, the Court in *New York Times* required that the actual malice element be proven by clear and convincing evidence, rather than by the mere preponderance of the evidence standard. See *N.Y. Times*, 376 U.S. at 285–86.

<sup>364</sup> The actual malice requirement contemplates a subjective, fact-specific test. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686, 688 (1989). Did the defendant actually know that the relevant statement was false or, if there was not such knowledge, did the defendant nevertheless communicate the statement with reckless disregard for the truth? If either existed, actual malice was present. See *id.* In cases decided after *New York Times*, the Court sought to clarify the reckless disregard inquiry by stating that it asks whether the defendant had a “high degree of awareness of . . . probable falsity,” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or “in fact entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); see also *Harte-Hanks*, 491 U.S. at 688. Reckless disregard thus contemplates something more blameworthy than mere negligence in failing to use reasonable care to ascertain truth or falsity. See *Harte-Hanks*, 491 U.S. at 688.

<sup>365</sup> *N.Y. Times*, 376 U.S. at 287–88.

<sup>366</sup> *Id.* at 269–70, 272, 278–79. In a later case, the Court extended the application of the actual malice requirement to defamation cases brought by public figure plaintiffs. See *infra* text accompanying notes 373–75.

<sup>367</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 376–77, 387–91 (1967).



vast range of published matter which exposes persons to public view, both private citizens and public officials.”<sup>368</sup> With the subject matter of the magazine article at issue in *Hill* clearly being a “matter of public interest,”<sup>369</sup> the Court reasoned that, as in *New York Times*, a method for providing First Amendment-based “breathing space” was necessary.<sup>370</sup> The *Hill* Court therefore turned to the method it fashioned in the earlier case and required that plaintiffs in false light publicity cases prove not only the basic elements of the claim but also the defendant’s knowledge of falsity or reckless disregard for the truth.<sup>371</sup> As it did in *New York Times*, the Court made clear in *Hill* that proof of mere negligence on the part of the defendant would not be sufficient to establish liability for false light publicity.<sup>372</sup>

During the seven years following *Hill*’s adoption of the actual malice requirement for false light publicity cases, the Supreme Court decided three more defamation cases and another false light

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<sup>368</sup> *Id.* at 388.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 388–90.

<sup>371</sup> *Id.* at 387–88, 390–91. The Court thus adopted the actual malice requirement. *See id.* Even though it did not use the *actual malice* label in *Hill*, the Court made clear that “the standard of knowing or reckless falsehood” came from the *New York Times* decision. *Id.* at 390. In *Hill*, the Court did not state whether it was also adopting the *New York Times* requirement that actual malice be proven by clear and convincing evidence. *See id.*; *see also N.Y. Times*, 376 U.S. at 285–86. However, the Court did state in *Hill* that “the First Amendment principles pronounced in *New York Times* guide our conclusion.” *Hill*, 385 U.S. at 390. This statement suggests a likely intent to adopt the earlier decision’s requirement of the higher standard of proof for the actual malice element. *See id.*

<sup>372</sup> *Hill*, 385 U.S. at 389. The Court stressed that “[i]n this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees [of freedom of speech and press].” *Id.* But “calculated falsehood” of the sort targeted by the *New York Times* standard “enjoyed no immunity” against liability in that case and “should enjoy no immunity in the situation here presented us.” *Id.* at 389–90. The Court then addressed the facts in *Hill* alongside the newly adopted actual malice requirement. *See id.* For a brief statement of key facts in the case, see *supra* text accompanying notes 333–36. The Court concluded that if a suitable jury instruction had been given, a reasonable jury weighing the evidence could have found either a merely negligent misstatement by the magazine or a portrayal that the magazine knew was false or communicated recklessly. *Hill*, 385 U.S. at 391. Because the instruction that was given did not prevent the jury from holding the defendants liable even if the jury did not find knowledge of falsity or reckless disregard for the truth, the Court reversed the lower courts’ judgment in favor of the plaintiff and remanded for further proceedings. *Id.* at 394–97.

publicity case. The first of those defamation cases, *Curtis Publishing Co. v. Butts*,<sup>373</sup> came only a few months after *Hill*. In *Butts*, the Court extended the actual malice requirement to defamation cases brought by public figures.<sup>374</sup> For a majority of the justices, treating public official plaintiffs and public figure plaintiffs under the same rule made constitutional sense because both of those types of plaintiffs played key roles in shaping public debate and engaged in activities of widespread public interest. Hence, the First Amendment interests at stake in defamation cases were the same, regardless of whether the plaintiff was a government official or a public figure.<sup>375</sup>

Next came *Rosenbloom v. Metromedia, Inc.*, a 1971 decision in which a plurality of the Court took the position that if the statement giving rise to the defamation case dealt with a matter of public interest or concern, the plaintiff should be expected to prove actual malice.<sup>376</sup> The *Rosenbloom* approach meant that even a private figure plaintiff (i.e., someone who was neither a public official nor a public figure) would be expected to prove actual malice if the public concern factor was present.<sup>377</sup> But *Rosenbloom* was short lived.

In the 1974 decision *Gertz v. Robert Welch, Inc.*, the Court pulled back from the public concern rationale relied on by the *Rosenbloom* plurality and held that if the plaintiff in a defamation case was a private figure, he need not prove actual malice in order to win the case.<sup>378</sup> The Court reasoned in *Gertz* that even though First

<sup>373</sup> 388 U.S. 130 (1967).

<sup>374</sup> *Id.* at 164 (Warren, C.J., concurring in the result). For an explanation of why Chief Justice Warren's concurrence in the result is regarded as setting forth the controlling rule in *Butts*, see Langvardt, *supra* note 361, at 97 n.39.

<sup>375</sup> *Butts*, 388 U.S. at 163-65 (Warren, C.J., concurring in the result). In a later decision, the Court offered insights on how one acquires public figure status. See *infra* note 379.

<sup>376</sup> 403 U.S. 29, 44 (1971). Recall that in *Hill*, the Court took an arguably similar tack when it held that plaintiffs in false light publicity cases must prove actual malice. See *Hill*, 388 U.S. at 387-88, 390-91. In *Hill*, the Court noted the broad range of matters that are in the "public view" and observed that the magazine article at issue dealt with a matter of "public interest." *Id.* at 388. The *Hill* Court did not appear to hinge the applicability of the actual malice requirement on whether the plaintiff was a public figure. See *id.* at 387-88, 390-91.

<sup>377</sup> See *Rosenbloom*, 403 U.S. at 44.

<sup>378</sup> 418 U.S. 323, 344-45, 348 (1974). The Court regarded *Rosenbloom's* public concern approach as unworkable and as subject to ad hoc, inconsistent determinations. *Id.* at 346.

Amendment interests are at stake for defendants in defamation cases brought by private figure plaintiffs, those interests are less strong than in public official and public figure cases.<sup>379</sup> Hence, requiring private figure plaintiffs to prove actual malice in order to win their cases would furnish too much protection to defendants and too little safeguarding of such plaintiffs' reputational interests.<sup>380</sup> The Court therefore held in *Gertz* that for a private figure plaintiff to win his case, he must prove a degree of fault specified by applicable state law, as long as that level of fault amounted to at least negligence (in the sense of failing to go as far as a reasonable person would have gone to ascertain truth or falsity).<sup>381</sup> Nearly all states responded to *Gertz* by choosing negligence as the applicable level of fault for private figure plaintiffs.<sup>382</sup>

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However, in a later decision, the Court effected a partial resurrection of the public concern factor. *See infra* note 381.

<sup>379</sup> *See Gertz*, 418 U.S. at 346–50. In determining that the plaintiff in the case before it was not a public figure and was therefore a private figure, the *Gertz* Court offered insight into types of public figures and how one may acquire public figure status. *Id.* at 332, 351–52. The Court noted that one becomes a public figure if he has achieved “such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.” *Id.* at 351. One who is not a general-purpose public figure in the sense just noted may be a limited-purpose public figure if, despite otherwise seeming to be a private figure, he “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Id.*

<sup>380</sup> *Id.* at 346–50.

<sup>381</sup> *Id.* at 346–48; *see also id.* at 353 (Blackmun, J., concurring). Because of its concerns that defamation's traditional allowance of presumed damages and the prospect of punitive damages could operate to chill the exercise of First Amendment rights, the Court held that if the plaintiff proves only the minimum degree of fault necessary to win the case (presumably negligence), the plaintiff's recovery of damages would be limited to actual damages for proven injury. *Id.* at 349–50 (majority opinion). To recover presumed and punitive damages, the plaintiff would need to prove actual malice. *Id.* Although *Gertz* expressed disapproval of the public concern-focused approach in *Rosenbloom* and opted instead for a status-of-the-plaintiff approach, *id.* at 332, 351–52, the Court partially re-invoked the public concern factor in a decision issued eleven years after *Gertz*. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In *Dun & Bradstreet*, the Court held that at least the *Gertz* rule dealing with presumed and punitive damages, if not also the *Gertz* rule establishing the fault requirement necessary for a private figure to win the case, applied only if the case dealt with a statement on a matter of public concern. *Dun & Bradstreet*, 472 U.S. at 751, 761, 763. Additional discussion of *Gertz*, as interpreted in *Dun & Bradstreet*, is beyond the scope of this Article. For such discussion, see Langvardt, *supra* note 361, at 98–103.

<sup>382</sup> *See* Langvardt, *supra* note 361, at 98 n.50.

*Gertz*'s spurning of the public concern approach and the decision's adoption of a status-of-the plaintiff framework may suggest questions about how *Hill* should be interpreted and applied. Should *Hill*'s requirement of proving actual malice continue to be regarded as applicable to all false light publicity cases, or might the Supreme Court take a *Gertz*-like approach regarding false light publicity and hold that if the plaintiff in such a case were a private figure, only negligence would need to be proven?<sup>383</sup> The Court declined to address such questions in *Cantrell v. Forest City Publishing Co.*, a false light publicity case decided shortly after *Gertz*.<sup>384</sup> In *Cantrell*, the Court ordered the reinstatement of a verdict for the plaintiffs after concluding that the Sixth Circuit had erred in vacating it.<sup>385</sup> The Court noted that the jury had been instructed on the actual malice requirement (i.e., on the need to find knowledge of falsity or reckless disregard for the truth), that no party to the case had objected to the instruction, and that the evidence sufficiently supported a finding of actual malice.<sup>386</sup> Therefore, the Court observed: "[T]his case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory . . . or whether the constitutional stan-

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<sup>383</sup> The Restatement suggested these questions in a caveat accompanying its false light publicity section, but did not attempt to take a position. RESTATEMENT (SECOND) OF TORTS § 652E caveat (AM. LAW INST. 1977).

<sup>384</sup> *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974). For discussion of basic facts in *Cantrell*, see *supra* text accompanying notes 337–42.

<sup>385</sup> *Cantrell*, 419 U.S. at 252–54. The jury returned a verdict in favor of the plaintiffs for compensatory damages after receiving instructions that required them to find actual malice in order to rule in favor of the plaintiffs. *Id.* at 249–50. The district judge did not allow the plaintiffs' request for punitive damages to go to the jury because he concluded that the plaintiffs failed to demonstrate that the defendants had acted "maliciously." *Id.* at 251. On appeal, the Sixth Circuit tossed out the jury verdict, reasoning that the district judge's ruling on the punitive damages issue meant that there must not have been an adequate evidentiary basis for the jury to have found actual malice for purposes of determining liability and an entitlement to compensatory damages. *Id.* at 247, 251–52. The Supreme Court, however, concluded that the jury instructions had properly spoken of actual malice in the sense of knowledge of falsity or reckless disregard for the truth, and that in the judge's ruling disallowing punitive damages, the judge probably was referring to applicable state law requiring common law malice (i.e., ill will, spite motives, and the like) as a prerequisite to a punitive damages award. *Id.* at 252. Hence, the Court concluded that the verdict in favor of the plaintiffs merited reinstatement. *Id.* at 252–54.

<sup>386</sup> *Id.* at 249–50, 252–53.

dard announced in *Time, Inc. v. Hill* applies to all false-light cases.”<sup>387</sup>

Since *Cantrell*, the Court has not taken up the questions that it expressly left open. Some courts, interpreting *Hill* in light of *Gertz*, have concluded that negligence is the appropriate level of fault in false light publicity cases brought by private figure plaintiffs.<sup>388</sup> Other courts, taking *Hill* at face value, have concluded that until the Court says otherwise, actual malice is the applicable fault requirement in a false light publicity case regardless of the status of the plaintiff.<sup>389</sup> For purposes of applying false light publicity principles to the performers’ rights scenarios addressed in this Article, it probably makes no difference whether *Hill* should, or should not, be treated as calling for a fault requirement less severe than actual malice if the plaintiff is a private figure. The plaintiffs in such scenarios, to which this Article now turns, would invariably seem to be public figures,<sup>390</sup> and are therefore clearly obligated to prove actual malice regardless of how broadly or narrowly *Hill* is interpreted.

#### IV. PERFORMERS VS. POLITICAL USERS: APPLYING FALSE LIGHT PUBLICITY PRINCIPLES

Neither right of publicity nor false endorsement under section 43(a) of the Lanham Act serves as a reliable legal theory for performers to assert when they seek relief against those who use their identities for political purposes. Given the lack of agreement among courts about how far the two theories can go in regulating noncommercial uses, and about how to account properly for the

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<sup>387</sup> *Id.* at 250–51.

<sup>388</sup> See *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1091–92 (5th Cir. 1984); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1288, 1292 (D.D.C. 1981); *Fitzgerald v. Penthouse, Int’l, Ltd.*, 525 F. Supp. 585, 602–03 (D. Md. 1981) (holding that plaintiff had to prove actual malice to win false light publicity claim because plaintiff was a public figure, but strongly suggesting that if plaintiff had been a private figure, only a showing of negligence would have been necessary), *aff’d in part, rev’d in part*, 691 F.2d 666 (4th Cir. 1982).

<sup>389</sup> See, e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1084–87 (9th Cir. 2002); *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1252, 1255–56 (9th Cir. 1997); *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1139–41 (7th Cir. 1985).

<sup>390</sup> They are widely known by large segments of society and, as such, would be public figures. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

First Amendment interests of defendants,<sup>391</sup> performers who find themselves in the scenarios addressed in this Article may want a different legal theory to invoke. If faced with deciding performer's rights cases, courts should also prefer a theory that would eliminate some of the uncertainties presented by attempts to apply right of publicity or false endorsement principles. False light publicity can serve as such a theory, even though it is a forgotten tort in the sense that its history has not included cases based on musical performers' disputes with political users. Section IV.A considers the ways in which false light publicity is a preferable theory for addressing such cases. Section IV.B explores the application of false light publicity's elements to performers' rights complaints against political users and addresses related issues that are likely to arise.

*A. Why False Light Publicity Instead?*

Two key features of false light publicity eliminate uncertainties and points of disagreement encountered under the right of publicity and false endorsement under section 43(a) of the Lanham Act. First, unlike the latter two theories, false light publicity does not present questions about whether the use was sufficiently commercial or about whether the theory can be applied as a basis for relief against defendants engaged in noncommercial uses.<sup>392</sup> It clearly can be so applied—and has been applied—in that manner. For instance, the Supreme Court's *Hill* and *Cantrell* decisions contemplated false light publicity liability on the part of magazines and newspapers even though speech in such contexts is normally considered noncommercial for First Amendment purposes.<sup>393</sup> Lower court decisions, including many cited elsewhere in this Article, also permit false light publicity liability to be imposed on defendants engaged in noncommercial expression in the context of magazines, books, and television and radio broadcasts.<sup>394</sup>

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<sup>391</sup> See *supra* text accompanying notes 121–69, 214–57, 265–95.

<sup>392</sup> See *supra* text accompanying notes 121–69.

<sup>393</sup> *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 246 (1974) (newspaper); *Time, Inc. v. Hill*, 385 U.S. 376, 377 (1967) (magazine). For discussion of the noncommercial classification for such uses under the First Amendment, see *supra* text accompanying notes 56–64.

<sup>394</sup> See, e.g., cases cited *supra* note 353.

Applying false light publicity principles to the performers' rights scenarios on which this Article focuses might at first glance seem different because doing so would reach instances of political speech on the part of defendants. However, for First Amendment purposes, political speech and other forms of noncommercial (and non-political) speech are classified the same way: as triggering so-called full First Amendment protection.<sup>395</sup> So it is not a stretch to say that if false light publicity can be imposed on a magazine engaged in noncommercial speech that happens not to be political in nature, such liability should be a prospect for those engaged in noncommercial speech that *is* political in nature. In terms of the First Amendment protection to be afforded, there is no difference between the two.

Of course, the fact that noncommercial speech (whether political or non-political) is such highly valued expression means that the relevant First Amendment-based test must be passed before false light publicity liability can be imposed. That legal reality leads to recognition of the second way in which false light publicity, as applied to the performers' rights scenarios addressed herein, is not plagued by the uncertainties and points of disagreement found in the right of publicity and false endorsement cases. As earlier discussion revealed, courts have sometimes struggled with how to account for First Amendment interests in right of publicity and false endorsement cases and have not always agreed on the appropriate tests or modes of analysis in that regard.<sup>396</sup> The First Amendment framework for false light publicity cases, however, is clear. The relevant test in false light publicity cases, of course, is supplied by the actual malice requirement, which the Supreme Court, borrowing from a landmark defamation decision, adopted long ago in *Hill*.<sup>397</sup> Though the actual malice requirement necessitates careful analysis, courts are familiar with the framework by virtue of decades of deci-

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<sup>395</sup> See *supra* note 104.

<sup>396</sup> See *supra* text accompanying notes 120–69.

<sup>397</sup> *Hill*, 385 U.S. at 387–88, 390–91. If performers seek to employ the false light publicity theory against political users of their identities and the requirements set forth in *Hill* therefore must be met, the setting in which *Hill* would be considered seems fitting in an unusual way. One of the attorneys who argued before the Supreme Court—unsuccessfully, by the way—was someone who made a bigger name for himself in politics (and in other ways) than in the practice of law: Richard M. Nixon. *Id.* at 376.

sions—mostly defamation decisions—in which it has been applied.<sup>398</sup> Such familiarity is a benefit, as is the lack of need for a court deciding a performers’ rights case on false light publicity grounds to expend judicial resources on deciding which First Amendment test or framework to apply.<sup>399</sup>

### *B. Applying the Elements*

This Section uses the basic facts of two leading performers’ rights cases as the primary vehicles for illustrating the potential application of false light publicity’s elements to performers’ disputes with political users. Jackson Browne’s dispute with the McCain presidential campaign and the RNC provides one of the sets of facts, and Don Henley’s dispute with a senatorial candidate provides another example. The two cases, of course, were litigated on grounds other than false light publicity.<sup>400</sup> This Section examines the facts of those cases through a false light publicity lens and employs the elements set forth in Section 652E of the Restatement:

- Publicity of a “matter” concerning the plaintiff;
- Depiction of the plaintiff in a false light that would be highly offensive to a reasonable person; and
- Knowledge of, or reckless disregard for, the falsity of the matter publicized and the false light in which the plaintiff was placed.<sup>401</sup>

The false light publicity theory does not always guarantee a win for the plaintiff, but it at least gives the performer a fair shot at ob-

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<sup>398</sup> The leading Supreme Court cases in that regard are summarized in Section III.C.

<sup>399</sup> Because the plaintiffs in the cases on which this article focuses would invariably be public figures, courts would not need to explore the question expressly left open by the Supreme Court in *Cantrell*: whether a lesser degree of fault than actual malice would be appropriate in a false light publicity case brought by a private-figure plaintiff. *See Cantrell v. Forest City Publ’g Co.*, 419 U.S. 245, 250–51 (1974).

<sup>400</sup> In *Browne*, the plaintiff sued on right of publicity and false endorsement grounds. The plaintiff in *Henley* brought a false endorsement claim. *See supra* text accompanying notes 78–82, 261.

<sup>401</sup> RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).



taining relief while affording appropriate protection for the expressive interests of defendants.<sup>402</sup>

### 1. *Browne* as a False Light Publicity Case

Jackson Browne's complaint against the McCain campaign and the RNC, as summarized earlier, centered around the use of his song and recording (*Running on Empty*) in an ad that promoted the McCain campaign and criticized the supposed Obama energy policy.<sup>403</sup> Instrumental portions of the recording were used, as were portions featuring Browne's vocals.<sup>404</sup> If the case had been litigated on false light publicity grounds, the first question under the Restatement would be whether there was publicity of a "matter concerning" Browne.<sup>405</sup> The publicity requirement contemplates widespread communication to the public—something that was clearly present, given the fact that the ad was televised and related videos were posted on the Internet.<sup>406</sup>

Was a "matter" publicized, however, for purposes of the elements set forth in the Restatement? The "matter" need not be an express statement; it may be something implied by the content and context.<sup>407</sup> There is a strong argument that the defendants' ad invoked Browne and his identity without expressly referring to him—in part, because of likely associations in the public mind between the recording and Browne, but, more importantly, because Browne almost certainly should be seen as possessing a true distinctive voice that extends beyond the particular song used in the defendants' ad. With the public likely to identify Browne's distinctive voice, Browne's identity was impliedly invoked as part of the ad.<sup>408</sup> That implied message should suffice as a "matter concerning" Browne for purposes of a false light publicity claim.

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<sup>402</sup> See *infra* text accompanying notes 420–28.

<sup>403</sup> See *supra* text accompanying notes 67–68.

<sup>404</sup> See *supra* text accompanying notes 67–77.

<sup>405</sup> RESTATEMENT (SECOND) OF TORTS § 652E.

<sup>406</sup> See *supra* text accompanying notes 315–16.

<sup>407</sup> See *supra* text accompanying notes 323–28.

<sup>408</sup> This analysis borrows from the treatment of distinctive voices under the right of publicity. See *supra* text accompanying notes 46–51; *supra* notes 50, 123. There is no reason why the two claims have to be completely walled off from each other in terms of useful insights. Of course, a right of publicity claim such as Browne's would raise a

Next, it would be necessary to determine whether the publicized matter portrayed Browne in a false light. Did it, for instance, portray him as holding beliefs he did not hold, or as having taken actions he did not take? The defendants' ad did not expressly say something along the lines of "Jackson Browne supports John McCain's candidacy for President" or "Jackson Browne thinks Barack Obama's energy policy is the wrong one for America." However, the notion of implied messages is again relevant. As earlier discussion revealed, the relevant false light often may come from what the defendant's communication implied through its content and context.<sup>409</sup> The use of Browne's distinctive voice and the serious tone of the express statements in the ad could credibly be interpreted by reasonable viewers as sending a message that Browne had lent his support to the McCain campaign or otherwise agreed with the energy-oriented content of the ad. Such a message, of course, would have been false.<sup>410</sup>

The next question is whether the false light would be highly offensive to a reasonable person.<sup>411</sup> As suggested in earlier discussion, courts that conclude a false light was present generally tend to conclude that the offensiveness threshold was also crossed.<sup>412</sup> Necessarily, this determination is highly fact-specific. In Browne's case, there is no doubt that he found the defendants' ad, and the messages conveyed about him, to be highly offensive. As a supporter of McCain's opponent rather than of McCain, and as a supporter of

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question in some courts about whether the use was sufficiently commercial. *See supra* text accompanying notes 121–69. False light publicity, however, can be applied as to noncommercial uses. *See supra* text accompanying notes 392–95. It is also important to note that Browne's true distinctive voice would keep his false light publicity claim from being subject to preemption because his voice is widely recognizable. Moreover, the false impression and offensiveness elements of the false light publicity claim would be extra elements of the sort that stave off preemption. *See supra* note 128.

<sup>409</sup> *See supra* text accompanying notes 323–28.

<sup>410</sup> The false light publicity element applied here may have a bit of a false endorsement ring to it, but it should not be seen as calling for a full likelihood of confusion analysis of the sort required in false endorsement cases. *See supra* text accompanying notes 180–81. Likelihood of confusion is not an element of a false light publicity claim. *See* RESTATEMENT (SECOND) OF TORTS § 652E. Rather, the appropriate approach is to ask whether the requisite false light portrayal can reasonably be perceived. *See, e.g., Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1083–84 (9th Cir. 2002).

<sup>411</sup> RESTATEMENT (SECOND) OF TORTS § 652E.

<sup>412</sup> *See supra* text accompanying notes 350–53.

other Democratic candidates over the years, he found the defendants' ad objectionable—far more than a minor annoyance.<sup>413</sup> He could reasonably be expected to have experienced humiliation, mental distress, and outright anger as a result of being portrayed publicly in a way that suggested he held beliefs he did not hold. But would Browne's subjective experience of being offended square with the objective test of whether a reasonable person would be seriously offended? An answer in the affirmative seems obvious. Perhaps the best evidence that a reasonable person in his position would find such a false light highly offensive comes in the form of the many complaints (referred to at the outset of this Article) by musicians about political uses of their songs, recordings, and identities.<sup>414</sup>

To win a false light publicity claim, Browne also would have needed to prove actual malice on the part of the defendants with regard to "the falsity of the publicized matter and the false light" in which he was placed.<sup>415</sup> As suggested earlier, the publicized matter would be the defendants' use of Browne's distinctive voice (and hence his identity) in a way that would cause the public to think of Browne.<sup>416</sup> In choosing a well-known song and recording that featured the vocals of a big-name star for use in their ad, the defendants should have known that the big-name star (Browne) would be identified in the minds of members of the public when they saw and heard the ad. The necessary knowledge of falsity as to that matter, therefore, would be present. In addition, Browne would have had to show that the defendants acted with knowledge of falsity or reckless disregard *as to the false light* in which Browne was portrayed. This part of the actual malice inquiry is more complicated. It logically begins with consideration of the defendants' knowledge of whether Browne was a McCain supporter and agreed with the ad's

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<sup>413</sup> See *supra* text accompanying note 76.

<sup>414</sup> See *supra* text accompanying notes 1–10.

<sup>415</sup> RESTATEMENT (SECOND) OF TORTS § 652E. *Time, Inc. v. Hill* imposes this requirement. See 385 U.S. 374, 387–88, 390–91 (1967); see also *supra* text accompanying notes 367–72. Because Browne clearly is a public figure, it is unnecessary to consider whether decisions issued after *Hill* suggest that a fault requirement less stringent than actual malice is permissible in a false light publicity case brought by a private figure plaintiff. See *supra* text accompanying notes 384–90.

<sup>416</sup> See *supra* text accompanying notes 409–10.

substantive content. It seems likely that the defendants either knew Browne did not support McCain and disagreed with what the ad said, or that they had no reason to believe Browne supported McCain and agreed with the ad's content. If they had no reason to believe those things were true, they should be regarded as having a "high degree of awareness of probable falsity"<sup>417</sup>—and hence reckless disregard for the truth—as to those matters.

But the necessary actual malice inquiry does not stop with these questions. Even if the defendants knew that Browne did not support McCain and did not agree with the ad's content, actual malice must also be shown as to whether the ad conveyed a false image about Browne *to the public*.<sup>418</sup> The correct inquiry regarding the false light element—whether a false light would be reasonably perceived by the public—must be remembered here. With that inquiry in mind, it becomes possible to argue credibly that the defendants either (a) knew of the danger that reasonable viewers of the ad would interpret it as indicating that Browne supported McCain's candidacy or otherwise held beliefs he did not hold, or (b) willfully disregarded the risk that reasonable members of the public would so interpret the ad. Under this analysis, the element of actual malice would be satisfied.<sup>419</sup>

The above application of the elements of a false light publicity claim indicates that performers who can invoke facts similar to those in *Browne* should have valid claims and should be entitled to appropriate damages for the humiliation, embarrassment, and emotional distress.<sup>420</sup> Moreover, a showing that the false light portrayal led to lost opportunities for the plaintiff might, on the right set of facts, reflect a significant enough causal connection to justify damages for such harm.<sup>421</sup> Whatever the full scope of the damages re-

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<sup>417</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

<sup>418</sup> RESTATEMENT (SECOND) OF TORTS § 652E.

<sup>419</sup> In this analysis, which is designed to sketch out how the false light publicity theory would be applied, no particular attention is being paid to the requirement that actual malice be demonstrated by clear and convincing evidence rather than a mere preponderance of the evidence. *See supra* text accompanying note 371. In an actual case, of course, the court would have to determine whether the evidence rises to that level.

<sup>420</sup> *See supra* text accompanying notes 354–57.

<sup>421</sup> *See Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1088 (9th Cir. 2002); *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1143–44 (7th Cir. 1985).

coverable by the successful plaintiff, the application of the false light publicity theory to scenarios such as that in *Browne* has a notable virtue: preventing performers from being forced to participate in the communication of messages with which they disagree. In addition, proper application of the theory can curtail the ability of defendants to reap political benefits from the non-political acts of others.<sup>422</sup>

## 2. *Henley* as a False Light Publicity Case

Not all disputes between performers and political users will have *Browne*-like facts. As this analysis reveals, the less *Browne*-like the facts are, the less likely it is that the plaintiff can succeed on false light publicity grounds. The *Henley* facts are instructive in that regard. Recall that, in *Henley*, the ex-Eagles ringleader and solo star lost his Lanham Act section 43(a)-based false endorsement claim against a senatorial candidate's campaign.<sup>423</sup> In ads, the campaign used portions of two songs that had become hit records for Henley, but did not use the recordings themselves.<sup>424</sup> The campaign altered the lyrics of the songs in an effort to express criticism of the candidate's political opponents. Some attempts at humor appeared to be present in the altered lyrics.<sup>425</sup> Although the vocalist in the ads sought to imitate the sound of Henley's voice, he evidently did not pull off a very good impersonation.<sup>426</sup>

If Henley had sued on false light publicity grounds, his prospects of success would not have been as strong as Browne's would have been if Browne had sued on that basis. Henley would have had no difficulty in meeting the publicity requirement, thanks to the widespread communication of the ads about which he complained. From there, however, Henley's chances of success would have begun to dwindle.

It is less clear than under the *Browne* facts that a "matter concerning" the plaintiff was publicized by virtue of the ads, given that only songs arguably associated with Henley, rather than his hit

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<sup>422</sup> See *S.F. Arts & Athletics, Inc. v U.S. Olympic Comm.*, 483 U.S. 522, 541 (1987).

<sup>423</sup> See *supra* text accompanying notes 263–85.

<sup>424</sup> See *supra* text accompanying notes 261.

<sup>425</sup> See *supra* text accompanying note 262.

<sup>426</sup> See *supra* text accompanying notes 258–61, 269.

recordings of those songs, were used. The recordings likely would have triggered stronger associations with Henley in the public's mind than the mere use of the songs did. Moreover, though Henley may have a distinctive voice that is identifiable without regard to any particular song,<sup>427</sup> the argument that his distinctive voice was used in the ads is weaker than in Browne's case. Henley's actual voice was not used (because the recordings were not used), and the vocal impersonator who sang in the ads may not have been good enough to invoke Henley in the public's mind. Thus, Henley might, at best, have squeaked by on the "matter concerning" element of a false light publicity claim.

Henley's prospects would have dimmed further on the question of whether the ads portrayed him in a false light. To the extent that they appeared to be sophomoric attempts at humor, the altered song lyrics would seem to lessen the likelihood that the public would interpret the ads as suggesting that Henley supported the DeVore candidacy for the Senate or agreed with the DeVore campaign's criticisms of political opponents. And if viewers of the ads thought of Henley, but perceived a bit of poking fun at him through the altered lyrics, the public would be even less likely to think that Henley shared the political views expressed in the ads. Thus, the false light element probably would not be satisfied. Had a false light been present, Henley no doubt would have found it highly offensive, but the offense taken by Henley to the ads would not be actionable absent the necessary false light.

Even if the necessary false light were present in the facts, Henley likely would have difficulty satisfying the actual malice element. The defendants evidently knew that Henley did not support the DeVore candidacy and probably did not agree with the content of the DeVore ads.<sup>428</sup> But, as noted in the discussion of the facts in *Browne*, the actual malice requirement also applies to the questions of whether a falsity regarding Henley's beliefs or actions was communicated to the public and whether the public would reasonably

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<sup>427</sup> See *supra* notes 50, 123.

<sup>428</sup> They claimed, after all, that they were trying to engage in parody of Henley in addition to expressing their political messages. See *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1156–57 (C.D. Cal. 2010).

perceive that false portrayal.<sup>429</sup> On those questions, proof of knowledge of falsity or reckless disregard for the truth probably would be lacking. The DeVore campaign could argue—probably credibly—that given the humorous tone of the ads and the extensive liberties taken with the lyrics of the songs used, they did not know of any meaningful risk that the public would draw incorrect conclusions about Henley’s beliefs or actions.

### 3. Final Thoughts Regarding Performers’ False Light Publicity Claims

If other performers, unhappy with political uses of their identities, choose to bring false light publicity cases, a few concluding thoughts and suggestions are in order. First, as indicated earlier, and demonstrated in the two previous sections, such a claim would have a much better chance of success if the facts resembled those in *Browne* than if they resembled those in *Henley*. Second, did the use of the performer’s identity occur in a campaign ad (or an ad sponsored by an organization that supports the candidate), or did the use occur at a campaign event? If it was the former, the chances of the public obtaining an incorrect impression regarding the performer’s beliefs or actions would seem greater than if it was the latter. Use of a recording at a campaign event, such as to provide entrance music as the candidate goes on stage, may simply cause the public to think that the campaign likes the music for whatever reason, not that the performer who sang on the recording supports the candidate or agrees with her positions. (The performer, of course, may be equally unhappy whether the use was in an ad or at an event, but the public’s perception may not be the same in the two instances.)

Third, the calculus set forth above may change if the use of the performer’s identity becomes an ongoing occurrence, such as where a candidate adopts a particular recorded song as a campaign symbol and the song is played repeatedly at campaign events. The ongoing, repeated nature of the use may falsely suggest to the public that the performer identifies with the candidate and has given the campaign the go-ahead to invoke the performer’s identity.

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<sup>429</sup> See *supra* text accompanying note 418.

Fourth, the content and tone of the defendant's use may carry great weight in the analysis. If an ad has a serious tone that appears to connect the use of the performer's identity to the political messages expressly set forth in the ad, creation of a false light portrayal of the performer may be likely. On the other hand, a humorous tone for the political messages contained in the ad may make it harder for a court to find a false light portrayal—particularly if some of the humor is directed at the performer and not just at a political opponent. Finally, a seemingly incidental use of a performer's identity in an ad—such as using recorded music briefly as background music without any substantive tie to the messages in the ad—may induce anger from performers, but is probably not enough to support a valid false light publicity claim.

#### CONCLUSION

Every election season reveals uses of songs and recordings by the campaigns of candidates for public office or by groups that support the candidates. Frequently, then, well-known performers who have recorded those songs complain about the uses of the songs and recordings (and of their recognizable voices). Performers who seek legal relief against those responsible for the political uses may find, however, that they “can't always get what [they] want”<sup>430</sup> if they bring a right of publicity claim or a claim for false endorsement under section 43(a) of the Lanham Act. Judicial concerns about the proper reach and application of those theories and uncertainties about how to account for First Amendment interests make the right of publicity and false endorsement less-than-reliable theories for performers to invoke against political users.

The forgotten tort of false light publicity is a better theory for use in this setting. It is well-established that this theory may be employed in regard to defendants' noncommercial speech. Moreover, the First Amendment aspects of false light publicity have been articulated by the Supreme Court. If performers try the false light publicity theory in the political-use settings on which this Article fo-

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<sup>430</sup> THE ROLLING STONES, *You Can't Always Get What You Want*, LET IT BLEED (Decca Records 1969). With apologies to Mick Jagger, Keith Richards, and the Rolling Stones.



cuses “they just might find [they] get what [they] need.”<sup>431</sup> Some performers’ claims should make the grade under false light publicity principles; others will not. In the process, however, courts faced with deciding such false light publicity cases will also find that they “get what [they] need”: a theory that sets the governing rules clearly enough and avoids the uncertainties presented by the theories performers have employed thus far against political users.<sup>432</sup>

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<sup>431</sup> *Id.* (with further apologies).

<sup>432</sup> *Id.*