

## **The Unbearable Likeness of Being**

**By Ted F. Gerdes**

RECENT COURT DECISIONS HIGHLIGHT THE TENSION BETWEEN ENTREPRENEURS' FIRST AMENDMENT RIGHTS AND CELEBRITIES' RIGHTS OF PUBLICITY.

What do the Three Stooges have in common with actor Dustin Hoffman in drag and a group of champion surfers? No, it is not some kind of bizarre slapstick sequel - *Gidget Meets the Three Stooges*. The correct answer is that they have all been involved in recent litigation involving the rights of publicity.

California's right of publicity statutes prohibit the unauthorized use of a person's "name, voice, signature, photograph, or likeness on or in products for purposes of advertising or selling.... "Civil Code Section 3344 protects living individuals, and Civil Code Section 3344.1 is the right of publicity statute for "deceased personalit[ies]."

A fine line exists between a protected First Amendment use of the name, voice, likeness, or image of an individual and a violation of California's right of publicity statutes. On one end of the continuum is the legitimate use of the photograph of an actress accompanying a story about her winning an Oscar or being arrested for shoplifting. On the opposite end is the clearly prohibited use of a celebrity photo in an advertisement endorsing a product. In the center is an area in which the permissibility of use is not quite so clear.

Extensive appellate court opinions in three recent high-profile right of publicity cases have practical implications for practitioners, but whether the contours of the law have been clarified or complicated remains an issue. The first case considered the sale of T-shirts incorporating drawings of the faces of the Three Stooges. The second involved the use of a doctored photo of Hoffman in an issue of *Los Angeles* magazine. The third scrutinized the reuse of a photograph of surfers in an Abercrombie & Fitch catalog.

In early January 2002, the U.S. Supreme Court, without comment, let stand the decision of the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*<sup>1</sup> This case began as an action filed by the heirs of the Three Stooges against charcoal artist Gary Saderup under Civil Code Section 990, formerly the statute protecting the publicity rights of deceased personalities.<sup>2</sup> Saderup had been making charcoal drawings of celebrities for 25 years. His drawings were used to create lithograph and silkscreen masters that were then used to produce multiple reproductions. Saderup sold lithographs and T-shirts bearing the likeness of the Stooges. Saderup's profit from the sale of these items was \$75,000. Based on these facts, the trial court found for Comedy III Productions - a corporation that owned all the necessary rights to the Stooges' likeness - and entered a judgment against Saderup of \$75,000 plus \$150,000 in attorney's fees. The judgment was affirmed on appeal.

Saderup argued against liability because the lithographs and T-shirts did not constitute an advertisement, endorsement, or sponsorship of a product.<sup>3</sup> The California Supreme Court read the right of publicity statute differently, stating, "[I]t makes liable any person who, without

consent, uses a deceased personality's name, voice, photograph, etc., either (1) 'on or in' a product, or (2) in 'advertising or selling' a product." The court concluded, "By producing and selling such lithographs and T-shirts, Saderup thus used the likeness of The Three Stooges '...on products, merchandise, or goods' within the meaning of the statute." <sup>4</sup>

Having found that Saderup's use of the Stooges' images fell within the confines of the right of publicity statute, the court turned to the difficult constitutional issue. Justice Stanley Mosk, writing for the majority, quoted *Guglielmi v. Spelling-Goldberg Productions*: <sup>5</sup> "The right of publicity derived from public prominence does not ward off caricature, parody and satire. Rather, prominence invites creative comment." The decision explained that Saderup's creations do not lose constitutional protection because they are for entertainment rather than informational purposes or because they are a form of nonverbal visual representation or because they appear on T-shirts.

Unfortunately for Saderup, at this point the tone of the opinion changed. "But having recognized the high degree of First Amendment protection for noncommercial speech about celebrities," the court continued, "we need not conclude that all expression that trenches on the right of publicity receives such protection." <sup>6</sup> The court referred to *Lugosi v. Universal Pictures*, <sup>7</sup> discussing the considerable time, money, and effort needed to obtain public prominence, and concluded, "The present case exemplifies this kind of creative labor." <sup>8</sup>

In *Guglielmi*, the court proposed a balancing test to distinguish protected from unprotected appropriation of celebrity likeness: "[A]n action for infringement of the right of publicity can be maintained only if the propriety interest at issue clearly outweighs the value of free expression in this context." <sup>9</sup> In *Comedy III*, the court borrowed, in a limited way, from the copyright concept of fair use. The fair use test, under 17 USC Section 107, comprises four factors.

Justice Mosk concluded that factor 2 - "the nature of the copyrighted work" - and factor 3 - "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" - were inappropriate in the right of publicity context. He did, however, find that the first factor - "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes"-was helpful.

### **Transformative Elements**

The relevant question to ask, according to the opinion, is whether the work in question adds something new to the original creation with a further purpose or different character, altering the original with a new expressive meaning or message that makes the new work "transformative." <sup>10</sup> The court held, "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist." <sup>11</sup>

The court observed that when "a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interests protected by the right of publicity." The court then acknowledged the fourth

factor in the fair use test - "the effect of the use upon the potential market for or value of the copyrighted work" - and reasoned that the addition of sufficient creative elements to transform the celebrity depiction enough to warrant First Amendment protection makes unnecessary any review of whether the new work cuts into the market for the celebrity's image.

In an effort to illustrate the concept of transformation, the court discussed *Cardtoons, L.C. v. Major League Baseball Players Association* <sup>12</sup> and *ETW Corporation v. Jireh Publishing, Inc.*, <sup>13</sup> among other cases. The *Cardtoons* court found First Amendment protection for a company that produced baseball cards containing caricatures that parodied major league baseball players, calling the cards "social commentary on public figures." <sup>14</sup> *ETW Corporation* was an Ohio case in which an artist utilized a montage of likenesses of plaintiff Tiger Woods in a painting that was reproduced in 5,000 prints for sale. According to Mosk, the *ETW* court held that the work was "a work of art and therefore protected under the First Amendment." Mosk disagreed with the holding if it meant that "any work of art, however much it trespasses on the right of publicity and however much it lacks additional creative elements, is categorically shielded from liability by the First Amendment." <sup>15</sup>

The *Comedy III* court posed a simple question to determine whether a work is transformative: "[D]oes the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?" <sup>16</sup> The court noted, "When the value of the work comes principally from some source other than the fame of the celebrity - from the creativity, skill, and reputation of the artist - it may be presumed that sufficient transformative elements are present to warrant First Amendment protection." <sup>17</sup>

Applying this test, the court found that Saderup's "undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of the Three Stooges so as to exploit their fame." <sup>18</sup> The court therefore concluded, "Were we to decide that Saderup's depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements." <sup>19</sup>

Unlike defendant Saderup in the *Comedy III* case, the First Amendment favored the defendant in the *Hoffman* case. "What do you get when you cross a hopelessly straight starving actor with a dynamite red dress? You get America's hottest actress." This caption appeared on a still photograph from the film *Tootsie* showing the film's star, Dustin Hoffman, in front of an American flag in a red-sequined evening dress and high heels. (In the film, Hoffman's character, an actor, wears drag to disguise himself as an actress auditioning for and then playing a female role in a television soap opera.) In its March 1997 Famous Hollywood issue, Los Angeles magazine had some artistic and editorial fun with this photo in an article entitled "Grand Illusions." Using computer technology, a number of memorable movie stills were altered, replacing the actors' clothing with current fashions. The doctored photos depicted famous actors in well-known scenes from *North by Northwest*, *The Seven-Year Itch*, *The Creature from the Black Lagoon*, and others. In the spoof of the Alfred Hitchcock film, Cary Grant was shown running away from the low-flying plane in a new suit and tie. Marilyn Monroe stands on the infamous sidewalk air vent coyly attempting to maintain her dignity in a current designer dress. The Creature raises a fright sporting Nike shoes. Hoffman's outfit was also changed. The original caption was omitted, replaced by a new one identifying the still from the film and adding,

"Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."

Hoffman found the fashion spread to be a drag and filed an action in federal district court, claiming that the publication of the photograph misappropriated his name and likeness in violation of California's right of publicity law. Permission to use the photograph had not been sought from Hoffman or the owner of the copyright, Columbia Pictures. The magazine asserted a First Amendment defense but to no avail. After a bench trial, Judge Dickran M. Tevrizian in *Hoffman v. Capital Cities/ABC, Inc.*<sup>20</sup> awarded Hoffman \$1,500,000 in compensatory damages, \$1,500,000 in punitive damages, and attorney's fees of \$269,528.50. *Los Angeles* magazine appealed.

### **Actual Malice**

In a July 2001 ruling based primarily on the First Amendment, the Ninth Circuit reversed the district court's holding.<sup>21</sup> "We evaluate this defense," Ninth Circuit Judge Robert Boochever stated, "aware of 'the careful balance that courts have gradually constructed between the right of publicity and the First Amendment and federal intellectual property laws.'"<sup>22</sup> The court continued, "Hoffman, a public figure, must therefore show that [Los Angeles magazine], a media defendant, acted with 'actual malice' that is, with knowledge that the photograph was false or with reckless disregard for its falsity."<sup>23</sup>

The court acknowledged a conundrum for celebrity plaintiffs in right of publicity cases: "Hoffman does not contest that he is a public figure. In fact, Hoffman alleges that he is a readily-identifiable individual whose persona has commercial value under his right of publicity claim."<sup>24</sup> Pleading a right of publicity cause of action essentially amounts to an admission or concession that the plaintiff is a public figure. Such a concession virtually guarantees application of the actual malice rather than the negligence standard. The former is a much more difficult obstacle for a plaintiff.

The district court had concluded that the use of Hoffman's likeness was commercial speech to which the First Amendment does not apply. It also found that *Los Angeles* magazine had acted with actual malice, reaffirming that the First Amendment does not protect knowingly false speech.

Actual malice does not enter into many right of publicity cases because the use of the celebrity likeness most often occurs in an advertisement. Commercial speech as defined in *Bolger v. Young Drug Products Corporation*<sup>25</sup> is speech that "does no more than propose a commercial transaction." Commercial speech does not receive the same level of protection as other types of expression.<sup>26</sup> Actual malice does not apply to speech categorized as commercial.<sup>27</sup>

Hoffman had argued that the magazine's use of his likeness was commercial. He was identified as wearing Ralph Lauren shoes, there was a Ralph Lauren advertisement elsewhere in the magazine (the ad did not feature shoes), and the magazine included a Shopper's Guide that provided stores and prices.

The *Hoffman* court concluded, "These facts are not enough to make the *Tootsie* photograph pure commercial speech. If the altered photograph had appeared in a Ralph Lauren advertisement, then we would be facing a case much like those cited above. But [*Los Angeles* magazine] did not use Hoffman's image in a traditional advertisement printed merely to sell a product." <sup>28</sup>

Throughout the opinion, the court continued to describe the use of the photo as noncommercial. No consideration was received from the designers, the article did not advance a commercial message and the article appeared on the cover and was listed in the magazine's table of contents to advance the theme of the Hollywood special issue. "Viewed in context, the article as a whole is a combination of fashion photography, humor and visual and verbal comments on classic films and famous actors," the court determined. "Any commercial aspects are 'inextricably entwined' with expressive elements, and so they cannot be separated out 'from the fully protected whole.'" <sup>29</sup>

The district court had ruled that, because the article was designed to "attract attention," it was not protected speech. <sup>30</sup> The Ninth Circuit deflected this argument by stating, "A printed article meant to draw attention to the for-profit magazine in which it appears, however, does not fall outside of the protection of the First Amendment merely because it may help to sell copies." <sup>31</sup>

As for actual malice, the district court found that the magazine published Hoffman's altered image knowing it was false: "[*Los Angeles* magazine] admitted that it intended to create the false impression in the minds of the public 'that they were seeing Mr. Hoffman's body.'" <sup>32</sup> The Ninth Circuit similarly considered the issue of whether the magazine acted with "reckless disregard for the truth" or a "high degree of awareness of the probably falsity" <sup>33</sup> and held that "[t]he evidence must clearly and convincingly demonstrate that [*Los Angeles* magazine] knew (or purposely avoided knowing) that the photograph would mislead its readers into thinking that the body in the altered photograph was Hoffman." <sup>34</sup>

Nevertheless, the court listed numerous statements throughout the magazine, and on its cover, that described the article and disclosed the fact that the fashion photographs were altered through digital techniques. Accordingly, the court concluded that *Los Angeles* magazine was entitled to full First Amendment protection and that "Hoffman did not show by clear and convincing evidence, which is 'far in excess of the preponderance sufficient for most civil litigation' that [*Los Angeles* magazine] acted with actual malice in publishing the altered *Tootsie* photograph." <sup>35</sup> Without proving malice in a non-commercial presentation, the court held that Hoffman had no case and his right of publicity was not violated.

### **The Importance of Context**

Barely two months after the *Hoffman* opinion, the Ninth Circuit rendered another right of publicity decision that appears to be in direct conflict with *Hoffman*. In *Downing v. Abercrombie & Fitch*, <sup>36</sup> the court reversed a U.S. district court ruling on summary judgment that the First Amendment protected Abercrombie's use of a photograph of the plaintiffs.

In the early 1900's Ezra Fitch was a successful lawyer who was bored with the law. He partnered with David Abercrombie to build a popular clothing retailer that today has more than 200 stores nationwide. The company also sells its merchandise through a subscription catalog called

*Abercrombie & Fitch Quarterly*. The catalog accounts for 80 percent of Abercrombie's total advertising budget. Each issue is more than 250 pages long and is designed around a theme. Approximately 25 percent of each issue is devoted to stories, news, and other editorial material.

The theme of Abercrombie's 1999 Spring Fever quarterly was surfing. It contained a Surf Nekid section that included an article on the history of surfing, another about the ecological group called the Surfrider Foundation, a piece written by the editor of *Surfer Magazine*, and an interview with world champion surfer Nat Young.

The issue also contained an article entitled "Your Beach Should Be This Cool" describing the history of Old Man's Beach at San Onofre, California. The page after this article contained a photograph of George Downing and the other plaintiffs. Surf photographer LeRoy Grannis had taken the photograph at the 1965 Makahia International Surf Championship in Hawaii. Grannis was paid \$100 by Abercrombie for use of the photograph. The plaintiffs received no compensation. Abercrombie decided to create T-shirts similar to those worn by the plaintiffs in the photograph. They were called Final Heat Tees and appeared in the quarterly two pages after the Grannis photograph.

The Ninth Circuit opinion discussed a number of issues: preemption of state law right of publicity claims by the federal Copyright Act, proper choice of law between California and Hawaii, Lanham Act claims, and defamation. In its treatment of the elements of a right of publicity claim, the court stated, "Plaintiff must allege a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose." <sup>37</sup> After a brief discussion of the First Amendment defense, the court, relying on and quoting *Eastwood v. Superior Court*. <sup>38</sup> stated, "The defense is not absolute; we must find 'a proper accommodation between [the] competing concerns' of the freedom of speech and the right of publicity."

Abercrombie had argued that the photograph illustrates an article about surfing and relied in part on *Dora v. Frontline Video, Inc.* <sup>39</sup> In that case, Mickey Dora, a surfing champion, sued the producer of a documentary about surfing, asserting a right of publicity claim. The trial court granted summary judgment in favor of the producer, which was affirmed by the California Court of Appeal on the grounds that the documentary was about a matter of public interest, surfing, and the producer was protected by a First Amendment defense.

The *Downing* court distinguished the *Dora* case, holding, "Although the theme of Abercrombie's catalog was surfing and surf culture, a matter of public interest, the use of Appellants' name and pictures is quite different from that involved in the *Dora* case.... *Dora* was depicted in the documentary because his identity directly contributed to the story about surfing, which came within the protected public interest." <sup>40</sup>

The court discussed the tenuous relationship between the photograph in the Abercrombie catalog and the theme presented. It declared that the photo was merely "window dressing to advance the catalog's surf theme." The catalog copy did not explain that the appellants were surf legends and did not connect them or the photo to any of the articles. The caption incorrectly identified where the photo was taken.

Riding in argumentative wave, the court had to navigate its earlier decision in *Hoffman* to avoid a logical wipeout. It distinguished the cases in two ways. First, according to the court, Abercrombie "used its catalog to promote its clothing while *Los Angeles Magazine* was unconnected to and received no consideration from the designer for the gown depicted in the article." Second, while Abercrombie placed the relevant photo on a page immediately preceding the shirts for sale. *Los Angeles* magazine "merely referenced a shopping guide buried in the back of the magazine that provided stores and prices for the gown." <sup>41</sup> Based upon these factors, the court concluded that "Abercrombie's use was much more commercial in nature, and, therefore, not entitled to the First Amendment protection afforded to [*Los Angeles Magazine's*] use of Hoffman's image." The court, at best, made precise, fact-based distinctions between the two cases.

Indeed, court decisions such as *Comedy III*, *Hoffman*, and *Downing* are all fact specific, and it is difficult to derive much practical guidance from them. Attorneys who advise media or celebrity clients need to reconcile these rulings beyond knowing simply that the use of an altered photo of Dustin Hoffman in drag from *Tootsie* is acceptable but a photograph of George Downing with a surfboard or a charcoal drawing of The Three Stooges is not. Still, the decisions offer some interesting and perhaps useful parallels.

A comparison of *Hoffman* and *Downing* reveals that the context of the use makes a difference. While one may dispute the court's characterization of the context, it is clear that when the use of a likeness falls within an editorial and informational context, a license is unnecessary. However, if the use falls within an advertising context, then permission is warranted. An unauthorized use in a commercial context is a violation of the right of publicity.

The difficulty in applying *Downing* is that it appears to lie between pure editorial use (as described in *Dora* or *Guglielmi*) and pure commercial use. Had the court concluded that the *Abercrombie & Fitch Quarterly* was as much an informational publication as a catalog, the court presumably would have reached an opposite result. The decision appears to indicate that it did not merely turn on the court's assessment that the quarterly was a catalog. What seemed to be determinative was the fact that the photograph was not clearly integrated into and tied to the editorial matter and that it appeared too close in proximity to the Final Heat Tees ad.

*Hoffman* may be helpful on the issue of a use in a setting that contains editorial and commercial elements. The *Hoffman* court referred to the "indirect connection" between the use of the photograph in the article and the advertising elsewhere in the magazine; *Downing* found a direct connection between the use of the photograph and the commercial purpose of the catalog.

What is not clear is whether the Downing photograph in the *Abercrombie & Fitch Quarterly* could have been used in a manner that was not offensive to the court and that warranted First Amendment protection. Would it have made a difference if the photo had been properly identified or if it was placed farther away from the ad for the Final Heat Tees or if it was directly connected to the editorial content? Is it possible that none of these solutions would have helped because the court deemed the quarterly a catalog (and, therefore, a commercial work) so that any use of the photograph in it would have required a license from the plaintiffs? The *Hoffman* case would have presented similar problems had the Ninth Circuit not seen the practical difficulty

created by the district court and resolved the confusion by determining that the doctored photograph was ultimately editorial in purpose.

While *Comedy III* may create a chilling effect on artists who draw, paint, or otherwise recreate the likeness of celebrities, it was perhaps the clearest of the three cases. Literal depictions of a celebrity that are mass-produced and sold are a violation of that celebrity's right of publicity- at least in California. The Ohio court in *ETW Corporation*, however, was not concerned about 5,000 prints of an unauthorized work containing the likeness of a celebrity. Had Tiger Woods been able to plead his case in California, these two seemingly opposite decisions might have been reconciled.

## Drawing the Line

Aside from the context of the use, the other wild card that exists in these cases is whether the work in dispute is transformative. The *Comedy III* court stated that parody or caricature is acceptable but was not definitive about what else is. The question that also arises is what is necessary to transform a work. The *Hoffman* court referenced the *Comedy III* standard when it stated, "*Los Angeles Magazine's* publication of the *Tootsie* photograph contained 'significant transformative elements'" <sup>42</sup> Judge Boochever asserted that Hoffman's body was substituted for another and that Hoffman's "entire case rests on his allegation that the photograph was not a 'true' or 'literal' depiction of him." The court concluded, "Regardless of the scope of *Comedy III*, it is clear to us that it does not strip *Los Angeles Magazine* of First Amendment protection."

In an interview with Reuters following the U.S. Supreme Court's decision not to review the California case, <sup>43</sup> defendant Saderup said, "Who knows - if we tint our pictures like Andy Warhol did, would they then be protected speech?" He continued, "I think the whole thing is a strike against artistic freedom.... I studied art professionally and worked at my craft for 40 years.... I'm actually trying to do something uplifting with the subject matter. It's sad that they (the court) didn't see the creativity in that."

Robert Benjamin, a stepson of Curly Joe DeRita (one of the members of the Three Stooges), was one of the attorneys representing the Stooges' heirs in the *Comedy III* case. Benjamin saw the issue differently. "He [Saderup] takes a simple charcoal drawing and puts it on a T-shirt. Now he will have to get permission from a celebrity, or if the celebrity is deceased, from his heirs." <sup>44</sup>

Where can an artist draw the line? Is only a single, original work of art protected? What elements are necessary to transform a work to warrant protection? What would have worked in the Three Stooges case? Justice Mosk noted, "When the value of the work comes principally from some source other than the fame of the celebrity - from the creativity, skill, and reputation of the artist - it may be presumed that sufficient transformative elements are present to warrant First Amendment protection." <sup>45</sup>

While these holdings finalized the disputes between the parties, they are not the final word for practitioners who represent celebrities or those who use likenesses. One might think the easy solution is to make sure that a likeness is always licensed. Such a practice, however, would create a chilling effect on editorial comment because it is unlikely that celebrities would allow

the use of their images in a negative context - even if the information that is being presented is accurate and true. The First Amendment requires latitude for information disseminated to the public.

It appears these three cases have been helpful only in their clarification that a likeness is given First Amendment protection when it is closely connected with legitimate editorial content and/or it contains significant transformative artistic elements. For other uses of likenesses, artists, magazine and catalog publishers, and other creative entrepreneurs should be prepared for the legal reality that, when they draw a line through the right of publicity of a celebrity under the jurisdiction of California, they might actually be crossing it.

*Ted F. Gerdes is an attorney with expertise in copyright and trademark and the clearance, acquisition, and exploitation of likeness and intellectual property rights. He has litigated right of publicity actions, including *Waits v. Frito Lay, Inc.* and *White v. Samsung Electronics America, Inc.**

1 Comedy III Prods., Inc. v. Gary Saderup, Inc. 25 Cal. 4th 387 (2001). See Bela G. Lugosi & Caroline H. Mankey, *Life after Death*, Los Angeles Lawyer, Apr. 1999, at 41.

2 During the time this suit was winding its way through the appellate process, Civil Code Section 990 was amended and renumbered as Civil Code Section 3344.1 joining Civil Code Section 3344, the right of publicity statute for living individuals. Changes were made to Civil Code Section 990 but not to the basic language cited by the court, "Any person who uses a deceased personality's name, voice, signature, photograph, or likeness in any manner, on or in products, merchandise, or goods, or for the purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof," This opening language is virtually identical to the opening language in Civil Code Section 3344.

3 Comedy III, 25 Cal. 4th at 395.

4 Id.

5 Guglielmi v. Spelling-Goldberg Prods. 25 Cal. 3d 860, 160 Cal. Rptr. 352, 603 P.2d 454 (1979).

6 Comedy III, 25 Cal 4th at 399.

7 Lugosi v. Universal Pictures, 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P. 2d 425 (1979).

8 Comedy III, 25 Cal 4th at 399.

9 Guglielmi, 25 Cal. 3d at 871.

10 Comedy III, 25 Cal. 3d at 404 (citing *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569 (1994)).

11 Id. At 405 (citing *Zacchini v. Scripps-Howard Broad, Co.*, 433 U.S. 562 (1977)).

12 *Cardtoons L.C. v. Major League Baseball Players Ass'n*, 95 F. 3d 959 (10th Cir. 1996).

13 *ETW Corp v. Jirch Pub'g, Inc.* 99 F. Supp. 2d 829 (N.D. Ohio 2000).

14 *Cardtoons*, 95 F. 3d at 969.

15 Comedy III, 25 Cal. 3d at 407 n.11.

16 Id. At 407.

17 Id.

18 Id. At 409.  
19 Id.  
20 Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867 (C.D. Cal. 1999).  
21 Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).  
22 Id. at 1183-84 (quoting Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 626 (6th Cir. 2000)).  
23 Id. at 1184 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).  
24 Id. at n.1.  
25 Bolger v. Young Drug Prods. Corp., 463 U.S. 60, 66 (1983).  
26 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 498 (1996).  
27 Proctor & Gamble Co., v. Amway Corp. 242 F. 3d 539, 556 (5th Cir. 2001).  
28 Hoffman, 255 F. 3d at 1185.  
29 Id. (quoting Gaudiya Vaishnava Soc'y v. City & County of San Francisco, 952 F.2d 1059 (9th Cir. 1991) (as amended)).  
30 Hoffman v. Capital Cities/ABC, Inc. 33 F. Supp. 2d 867, 874 (C.D. Cal. 1999).  
31 Hoffman, 255 F. 3d at 1186 (citing Dworking v. Hustler Magazine, inc. 867 F. 2d 1188, 1198-98 (9th Cir. 1989)).  
32 Hoffman, 33 F. Supp. 2d at 875.  
33 Hoffman, 255 F. 3d at 1186 (citing Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989)).  
34 Id. at 1187 (citing Eastwood v. National Enquirer, Inc., 123 F. 2d 1249, 1256 (9th Cir. 1997)).  
35 Id. at 1189.  
36 Downing v. Abercrombie & Fitch, 265 F. 3d 994 (9th Cir. Sept. 13, 2001). The Ninth Circuit's reversal of the district court's grant of summary judgment for the defendant allowed the case to proceed. At press time, a trial date was set for May 14, 2002.

37 Id. at 1001.  
38 Eastwood v. Superior Court, 149 Cal.App. 3d 409, 422 (1983).  
39 Dora v. Frontline Video, Inc. 15 Cal.App. 4th 536 (1993).  
40 Downing, 265 F. 3d at 1002.  
41 Id. at 1003 n.2.  
42 Hoffman v. Capital Cities/ABC, Inc. 255 F.3d 1180, 1184 n.2 (9th Cir. 2001) (quoting Comedy III Prod., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 405 (2001)).  
43 "Supreme Court Sides with Heirs of The Three Stooges," Reuters, Jan 8, 2002 (on file with author).  
44 Id.  
45 Comedy III, 25 Cal. 4th at 407.