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Celebrity Endorsement: Recognition of a Duty, 21 J. Marshall L. Rev. 47 (1987)

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CELEBRITY ENDORSEMENT: RECOGNITION OF A DUTY

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INTRODUCTION

Having seized the attention of the public, the celebrity has become a powerful force in society, with the ability to influence and control behavior. The celebrity is a recent phenomenon created by the convergence of the Graphic Revolution and society's unsurpassed, ever-increasing craving for entertainment—a craving that noted radical, Abbie Hoffman, described as unequaled even by the later days of the Roman Empire with its circuses and orgies.[1] As Daniel J. Boorstin, Librarian of Congress, stated in *The Image*, celebrity-worship has replaced hero worship and celebrities have become the "guiding stars of our interest."[2]

In recognition of the value of celebrity status, the law protects celebrities' identities through a right of publicity.[3] This right allows celebrities to license others to use their names or identities for commercial purposes and enables them to prevent all unauthorized uses.[4] Celebrities have not hesitated to enjoy this right, consenting—for substantial compensation—to advertisers' use of their names and identities to sell many products and services. For the right price, celebrities tell us what to wear, what to eat and drink, where to vacation, what kind of car to drive, and even what kind of soap to use. As advertising statistics demonstrate, we listen.[5]

Celebrity endorsements, however, have generally been a one-way street. Although celebrities reap great profits from the exercise of their rights of publicity, essentially they do not have a corresponding duty to the public, over whom they knowingly exercise in-

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1. A. HOFFMAN, ABBIE HOFFMAN SOON TO BE A MAJOR MOTION PICTURE 222-23 (1980).

2. D. BOORSTIN, THE IMAGE 47 (1978).

3. *See, e.g.*, Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (recognizing a common law right to publicity); Allen v. National Video, 610 F. Supp. 612 (S.D.N.Y. 1985) (providing statutory right to publicity); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970) (right to publicity recognized at common law).

4. *See infra* notes 10-11 and accompanying text.

5. See *infra* note 37 and accompanying text.

fluence.[6] Historically, courts have not recognized causes of action against celebrities who have induced consumer action which have consequently caused injury.[7]

After tracing the development of the right of publicity, this article examines legal theories under which a celebrity would be held liable for the exercise of his right of publicity in a manner harmful to consumers. The article then presents public policy reasons justifying such liability. Finally, the article discusses anticipated consequences of recognizing this cause of action.

I. The Right of Publicity

In 1907, when a flour company placed a woman's portrait on its advertisements in an effort to increase sales, she did not prevail in an action against the company for its unauthorized use of her portrait.[8] Furthermore, even had she prevailed, the court would probably have awarded only nominal damages.[9] Since that time, however, courts and legislatures, in an effort to meet the needs of celebrities[10] have recognized and protected the pecuniary interest an individual has in the publicity value of her identity.[11] This is particularly true

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6. M.J. Simon, The Law for Advertising & Marketing (1956).

7. *See supra* note 69 and accompanying text.

8. Roberson v. Rochester Flour Co., 171 N.Y. 538, 64 N.E. 442 (1902).

9. *See, e.g.*, Flake v. Greensboro New Co., 212 N.C. 780, 195 S.E. 55 (1938) (granting only nominal damages to singer when photograph used in advertisements for both vaudeville and local bakery); Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (C.P. Cuyahoga Cty. 1938) (precluding actress from complaining of unauthorized use of photograph to advertise burlesque house).

10. Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3rd Cir. 1956). *See also* Commerce Union Bank v. Coors, 7 Media L. Rep. (BNA) 2204 (Ch. Ct. Tenn. 1981) (noting Tennessee's interest in continued growth of Nashville and Memphis as music centers).

11. *E.g.*, Haelen Labratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.) (applying common law), *cert. denied*, 346 U.S. 816 (1953); Bi-Rite Enterprises v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1975) (recognizing protection through common law); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975) (protecting right of publicity through common law); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970) (applying common law), *cert. denied*, 440 U.S. 908 (1979). *But see* Allen v. National Video, 610 F. Supp. 612 (S.D.N.Y. 1985) (right of publicity statutory and not encompassed by common law).

Seven states have passed legislation codifying the right to publicity. Cal. Civ. Code § 990 (West Supp. 1985); Mass. Gen. Laws Ann. ch. 214, § 3A (West 1985); Neb. Rev. Stat. § 20-202 (1983); N.Y. Civ. Rights Law §§ 50, 51 (McKinney 1976); Okla. Stat. tit. 21, § 839 (criminal statute); R.I. Gen. Laws § 9-1-28 (1985); Va. Code Ann. § 8.01-40 (1984); Wis. Stat. § 895.50(2)(b) (1983).

See also Allen v. National Video, 610 F. Supp. 612 (S.D.N.Y. 1985) (Woody Allen's right of publicity protected under the Lanham Trademark Act, 15 U.S.C. § 1125(a)); Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314 (C.P. Phila. Co. 1957) (right of publicity simply an application of the doctrine of unfair competition to property right).

See generally Pilpel, *The Right of Publicity*, 27 Bull. Copyright Society of the U.S.A. 249 (1979); Note, *Torts—The Right of Publicity—Protecting a Celebrity's*

in the case of public figures, most notably athletes and entertainers.[12]

At first, celebrities sought to protect their rights under privacy theories.[13] This proved ineffective,[14] however, because the purpose of the right of privacy was to protect an individual's sensibilities, and "[i]n reality, the injury to sensibilities concept does not normally meaningfully apply when a person routinely permits advertising uses of his name or picture."[15] The harm resided not in the use of the celebrity's identity but in the advertiser's failure to pay for the use of that identity.[16] Today an independent right of publicity has received widespread acceptance.[17]

Distinguishing the right of publicity from invasion of privacy torts, courts have described the pecuniary interest a celebrity has in his identity as a property right. For example, in *Hirsch v. S.C. Johnson & Son, Inc.*,[18] the court concluded that "the right of a person to be compensated for the use of his name for advertising purposes" differs from other privacy torts because "it protects primarily the property interest in the publicity value of one's name."[19] Similarly, the district court of Minnesota described the identity of a celebrity as "the fruit of his labors and a type of property."[20] The right of privacy, on the other hand, focused on the individual's right to be let alone.[21]

Identity, 52 TENN. L. REV. 123 (1984).

12. In Chaplin v. National Broadcasting Co., 15 F.R.D. 134, 139-140 (S.D.N.Y. 1953), the court stated, "The right of publicity recognizes the pecuniary value which attaches to the names and pictures of public figures, particularly athletes and entertainers, and the right of such people to this financial benefit." *Cf.* Martin Luther King Jr. Center for Social Changes v. American Heritage Prods., 508 F. Supp. 854 (N.D. Ga. 1981); *modified*, 250 Ga. 135, 8 Media L. Rep. (BNA) 2377 (Ga. 1982) (right not limited to entertainers and athletes, but may be available to any public figure).

13. Ciffelli, *The Right of Publicity—A Trademark Model for its Temporal Scope*, 57 CONN. BAR J. 373, 375 (1983).

14. For example, in O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir.), *cert. denied*, 315 U.S. 823 (1942), the court reasoned that while a private plaintiff might have a claim under a right of privacy theory, a well-known professional football player was "not such a person and the publicity he got was only that which he had been constantly seeking and receiving."

15. Treece, *Commerical Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 641 (1973).

16. *Id.*

17. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953). *See also* Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); Note, *Torts—The Right of Publicity—Protecting a Celebrity's Identity*, 52 TENN. L. REV. 123 (1984). *But see* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (right of publicity merged with the appropriation branch of the right of privacy).

18. 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

19. *Id.* at 382, 280 N.W.2d at 132.

20. Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).

21. Factors, Etc., Inc. v. Creative Card Co., 444 F. Supp. 279, 283 (S.D.N.Y.

Recognition of the need to protect a celebrity's pecuniary interest in his identity is premised on the fact that because he invested time and money to establish his fame, he should have the right to reap the benefits of it. In *Zacchini v. Scripps-Howard Broadcasting Co.*,[22] the only Supreme Court case dealing with the right of publicity, the Court described a state's goal in protecting the right of publicity as "closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors . . . ."[23]

II. Expansion of the Right of Publicity

Although the earliest cases recognizing a right of publicity focused on preventing the unauthorized use of a celebrity's "name or likeness,"[24] the scope of protection has expanded significantly. Today, the boundaries of "likeness" are wide.[25] Courts now recognize that a celebrity has a legitimate proprietary interest in his personality and that a defendant may violate this right, even if he does not use the celebrity's "name, portrait or picture."[26] Celebrities now may now also receive protection for their nicknames,[27] their cars,[28] and slogans associated with their identities.[29] In addition, the majority of jurisdictions now provide, either through case or statutory law, that the right of publicity is assignable[30] and descendible.[31]

1977), *aff'd sub nom.* Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

22. 433 U.S. 562 (1977).

23. *Id.* at 573. *See also* Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).

24. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

25. Price v. Worldvision Enterprises, Inc., 455 F. Supp. 252, 4 Media L. Rep. (BNA) 1301 (S.D.N.Y. 1978) (heirs of deceased comedians Laurel and Hardy obtained relief against defendant's television programs because they constituted "more than a permissible imitation" of names and likenesses of comedians through impersonation of appearances, costumes, mannerisms and voice similarities), *aff'd*, 603 F.2d 214 (2d Cir. 1979); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (magazine's use of champion boxer's likeness enjoined); Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379, 482 N.Y.S. 457, 472 N.E.2d 307 (1984) (unconsented use of rear view photo of nude woman and child raised issue of identification). *But see* Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973).

26. Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

27. *Hirsch*, 90 Wis. 2d 379, 280 N.W.2d 129.

28. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

29. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

30. Memphis Dev. Found. v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); Allen v. National Video, 610 F. Supp. 612 (S.D.N.Y. 1985); Uhlaender v. Henrickson, 316 F. Supp. 1277 (D. Minn. 1970).

31. Acme Circus Operating Co., Inc. v. Kuperstock, 711 F.2d 1538, 9 Media L. Rep. (BNA) 2138 (11th Cir. 1983) (right descendible when it has been exercised in

Accordingly, using the right of publicity, a celebrity may prevent the unauthorized use of his name in advertisements of products or services.[32] Furthermore, he may recover both profits and compensatory damages from the unauthorized user.[33] In some states, if the unauthorized use is knowing and willful, the celebrity can recover punitive damages.[34]

III. The Right of Publicity and the Celebrity Endorsement

The expanding right of publicity provides celebrities with the opportunity to use their names for great profits. This is particularly true in advertising, where a celebrity's endorsement of a product or service can attract consumer attention,[35] add status or credibility to

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conjunction with a specific product or business during lifetime); Groucho Marx Productions, Inc. v. Day and Night Co., Inc., 523 F. Supp. 485 (S.D.N.Y. 1981) (recognizing descendible publicity right), *rev'd on other grounds*, 689 F.2d 317, 8 Media L. Rep. (BNA) 2201 (2d Cir. 1982); Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1983) (right descendible when it had been exploited during lifetime of celebrity); Martin Luther King Jr. Center for Social Change, Inc. v. American Heritage Prods., Inc., 508 F. Supp. 854 (N.D. Ga. 1981) (right of publicity descendible), *modified*, 250 Ga. 135, 8 Media L. Rep. (BNA) 2377 (1982); Hicks v. Casablanca Records, 464 F. Supp. 426, 4 Media L. Rep. (BNA) 1497 (S.D.N.Y. 1978) (right acknowledged but did not attach for first amendment reasons); Commerce Union Bank v. Coors, 7 Media L. Rep. (BNA) 2204 (Ch. Ct. Tenn. 1981) (recognizing descendible right of publicity). *But see* Memphis Dev. Found. v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir.) (although assignable, right terminated at death), *cert. denied*, 449 U.S. 953 (1980); Reeves v. United Artists, 572 F. Supp. 1231, 9 Media L. Rep. (BNA) 2484 (N.D. Ohio 1983) (publicity right not descendible), *aff'd*, 765 F.2d 79 (6th Cir. 1985); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 5 Media L. Rep. (BNA) 2185 (1979) (right of publicity not descendible when celebrity does not exploit it during lifetime).

Seven states have made the right of publicity descendible by statute. Cal. Civ. Code § 990 (West Supp. 1985) (right survives for fifty years); Fla. Stat. Ann. § 540.08 (West 1972) (right survives for forty years); Neb. Rev. Stat. §§ 20-202, 20-208 (1983); Okla. Stat. Ann. tit. 21, § 839.2 (West Supp. 1980); Tenn. Code Ann. § 47-25-1107 (right surv ives ten years); Utah Code Ann. § 76-9-406 (1978); Va. Code § 8.01-40 (1977) (right survives twenty years). *See also Estate Zealously Guards Chaplin's Little Tramp*, L.A. Times, June 12, 1984, § 4, at 1.

32. Cher v. Forum Int'l, 692 F.2d 634, 8 Media L. Rep. (BNA) 2484 (9th Cir. 1982) (suggestion that singer-actress Cher endorsed magazine violation of her right of publicity); Allen v. National Video Inc., 610 F. Supp. 612 (S.D.N.Y. 1985) (use of Woody Allen look-alike to market video cassettes enjoined); Carson v. Here's Johnny Portable Toilets, Inc., 498 F. Supp. 71 (E.D. Mich. 1980) (violation of talk show host Johnny Carson's right of publicity in advertising campaign for portable toilets); Onassis v. Christian Dior, 472 N.Y.S.2d 254, 10 Media L. Rep. (BNA) 1859 (1984) (unauthorized use of Jackie Onassis look-alike enjoined); Commerce Union Bank v. Coors, 7 Media L. Rep. (BNA) 2204 (Ch. Ct. Tenn. 1981) (violation of blue grass music star's right of publicity by placement of his picture on calendar advertising beer). *See also* G. Rosden & P. Rosden, The Law of Advertising § 29.02 (1985).

33. Pilpel, *State Remedies for Improper Use of Name*, 4 Ent. Law & Finance 1 (July 1985).

34. *Id.*

35. According to Michael Rotary, Vice-president of Marketing of Anheuser-Busch, "[T]he celebrity presenter brings a sense of familiarity to the message and people will listen, people like seeing a friendly face in the one-on-one communication

the product,[36] and, most importantly, increase sales of the product or service advertised.[37]

Indeed, celebrities are increasingly capitalizing on their publicity rights. A celebrity such as John Wayne could earn $350,000 a year for a commercial shown only in California and $500,000 for lending his name to a nationally advertised product.[38] James Garner entered into a $3,000,000 deal with Polaroid.[39] By 1986, a Superbowl quarterback could expect to earn from $500,000 to $1,000,000 after the big game.[40] In 1983, actor Alan Alda signed an estimated $2,000,000-a-year deal with Warner Communications to endorse home computers.[41] In 1985, for a few weeks' work for Coca-Cola and General Foods, actor Bill Cosby was paid approximately $1,500,000, which was more than the salary of either company's chief executive.[42] The contracts singers Michael Jackson and Lionel Richie signed with Pepsi-Cola were estimated at $5,000,000 each.[43]

What accounts for this flood of celebrity endorsements?[44] The answer is simple: celebrity endorsements work. Testimonials by

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that t.v. [sic] gives." *Celebrity Pitch Scores High in Low-cal Premium Beer Ads*, 50 ADVERTISING AGE S14, S15 (July 30, 1979).

36. Treece, *supra* note 15, at 646; *Who Said That?*, 16 TELEVISION AGE 32, 76 (1968); *Boone's Acne Ads Spotty, FTC Says*, L.A. Times, May 12, 1978, § 1, at 6, col. 1.

37. Gallup and Robinson studies indicate that the use of celebritites has succeeded in moving many products, sometimes phenomenally so. *More Than Just a Passing Fancy*, 50 ADVERTISING AGE S1, S16 (July 30, 1979). *See also* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT-ENDORSEMENTS IN ADVERTISING: REPORTS BY THE COMMITTEE ON CONSUMER POLICY 47, 63 (1982) (power of the celebrity endorser recognized throughout Europe and Australia; voluntary codes prohibit celebrities from endorsing medicine, medical treatments, tobacco and alcohol); V. PACKARD, THE HIDDEN PERSUADERS 124 (1980); Jones, *Celebrity Endorsements: A Case for Alarm and Concern for the Future*, 15 NEW ENG. L. REV. 521 (1980); Treece, *supra* note 15, at 644 (use of celebrities in advertising motivates consumers to purchase products); *Wayne's S & L Pitch Brings Digs, Deposits*, L.A. Times, Mar. 5, 1978, § 4, at 1; *A Fortune in Images*, L.A. Times, Oct. 10, 1977, § 4, at 13. However, according to a 1984 survey of 1000 adult television viewers by the New York advertising-research company, Video Storyboard Tests, half of all television viewers believe celebrities who appear in ads do so merely for renumeration. *When You Wish Upon a Star*, 112 FORTUNE 66 (1985).

38. *Wayne's S & L Pitch Brings Digs, Deposits*, L.A. Times, Mar. 5, 1987, § 4, at 1.

39. *Celebrities Brighten More Ad Campaigns—And Darken a Few*, Wall St. J., Aug. 15, 1978, at 1, 41.

40. *Grid Stars Play the Big-Bucks Name Game*, Boston Herald, Jan. 24, 1986, at P12.

41. *When You Wish Upon A Star*, 112 FORTUNE 66 (Aug. 19, 1985).

42. *Id.*

43. *Id.*

44. Celebrities often receive greater compensation for their endorsements than they do for their work. For example, Chris Evert Lloyd collected $1,200,000 from tennis tournaments and exhibitions, but over $1,800,000 for endorsing warm-up suits and decorative patches. *The Smash Women Are Making in Tennis*, BUSINESSWEEK, Apr. 8, 1985, at 92.

well-known personalities have "stronger appeal to the purchasing public than other types of advertising."[45] Hence, they stimulate sales of the products and services endorsed.[46] As two circuit courts of appeals have noted, sales stimulation may be the result of the ability of celebrities to transfer their recognition and influence from one field to another.[47]

Courts expressed concern as early as 1907 about the dangers that misuse of endorsements pose to consumers. In *Von Thodorovich v. Franz Josef Beneficial Association,*[48] a federal district court enjoined the unauthorized use of the name and portrait of the emperor of Austria-Hungary on the defendant's advertising. The court stated that the picture gave credence to the product among Austro-Hungarian immigrants, and was likely to deceive them into investing their money in the company with little chance of return.[49] Similarly, the Supreme Court, in *FTC v. Standard Education Society,*[50] held that it was unlawful to use endorsements given for one article for the purpose of endorsing another, because such an action could mislead and harm consumers.[51] A whole series of Federal Trade Commission Guides concerning use of endorsements and testimonials in advertising is based on the presumption that a substantial number of consumers believe that a person who endorses a product not only uses it, but has tested it, and recommends it on that basis.[52] In addition, regulations of the Bureau on Alcohol, Tobacco and Firearms ban active athletes from advertisements for alcoholic beverages.[53]

IV. Celebrities' Duties to Consumers

Because the law treats a celebrity's identity as property which he may use, lend or sell to others for profit, the celebrity, like other property owners, should not be permitted to use his property with

45. *In re* American Chemical Point Co., 45 F.T.C. 9, 27 (1948).

46. *See supra* note 37.

47. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294 n.15 (D.C. Cir. 1980); Brewer v. Memphis Publishing Co., Inc., 626 F.2d 1238, 1254 n.22 (5th Cir. 1980).

The ability of actors and entertainers to invade the political world exemplifies this trend. Ronald Reagan, an actor, became Governor of California and President of the United States. Bill Bradley, a basketball star, was elected to the United States Senate. Clint Eastwood, an actor, became the mayor of Carmel, California. *Eastwood Marks Landslide Victory*, N.Y. Times, Apr. 10, 1986, at A20, col. 1.

48. 154 F. 911 (E.D. Penn. 1907).

49. *Id.* at 913.

50 302 U.S. 112 (1937).

51 *Id.* at 116. *See also In re* Mendoza Fur Dyeing Works, Inc., 32 F.T.C. 325 (1941).

52. 16 C.F.R. §§ 255.0 (1985). *See* Treece, *supra* note 15, at 646.

53. Bureau on Alcohol, Tobacco and Firearms, Rev. Ruling 54-513 (1954).

impunity or in a manner harmful to others. Along with recognition of the proprietary right of one's identity a concurrent duty to refrain from using that right to the detriment of others should attach. The celebrity's right of publicity "has commercial value only because the law has granted him the exclusive right to deal in the marketplace with his name, picture or opinion."[54]

Federal Trade Commission ("FTC") Guides recognize that endorsers have such a duty. The FTC requires that endorsements reflect the honest opinions, findings, beliefs, or experience of the endorser.[55] The Guides also state that endorsements may not contain any representations which are deceptive, or cannot be substantiated by the advertiser.[56] With reference to celebrities, the Guides state:

> An advertiser may use an endorsement of an expert or celebrity only as long as it has good reason to believe that the endorser continues to subscribe to the views presented, and in particular where the advertisement represents that the endorser uses the endorsed product, then the endorser must have been a bona fide user of it at the time the endorsement was given, Additionally [sic], the advertiser may continue to run the advertisement only so long as he has good reason to believe the endorser remains a bona fide user of the product.[57]

In addition, the FTC issued a written statement which stated that a celebrity's failure to make a reasonable effort at independent evaluation of a product he endorsed could result in personal liability for harm to consumers.[58]

Moreover, most entertainment lawyers advise celebrities that they have a duty to check into the kind of company which they endorse.[59] Indeminification clauses are included in endorsement contracts as a matter of course.[60] Celebrities often require that advertisers take out insurance in their favor prior to granting endorsements.[61]

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54. Note, *Liability of Advertising Endorsers*, 2 STAN. L. REV. 496, 497 (1950).

55. 16 C.F.R. § 255.1(a) (1985).

56. *Id.*

57. 16 C.F.R. §§ 255.2(b), 255.2(c) (1985).

58. Krakow, *Cause Celebre and the Celebrities*, 50 ADVERTISING AGE S1, S16 (July 30, 1979).

59. Comments by Lee A. Fentress, Advantage International, at the American Bar Association Forum Committee on the Entertainment and Sports Industries, in Baltimore, Md. (Feb. 8, 1986).

60. PRACTISING LAW INSTITUTE, COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 727 (1986).

61. The following is a typical clause relating to insurance coverage which is inserted in an agreement between a celebrity and an advertiser:

> Advertiser warrants and represents that Advertiser shall maintain in effect during the entire term of this agreement an Errors and Omissions insurance policy with an insurance company acceptable to Celebrity in the amount of not less that $1,000,000 per any individual claim and $3,000,000 for aggregate claims. Said policy shall designate Celebrity as a named insured. Upon Celebrity's request, Advertiser shall furnish Celebrity with a Certificate of Insurance

The industry's recognition of a duty, however, even coupled with the FTC Guides, does little for the consumer who is harmed by a celebrity's endorsement. The FTC Guides lack the force of law.[62] Although the Federal Trade Commission Act, under which the Guides are issued[63] provides for consumer redress,[64] it gives no private right of action.[65] Moreover, the Commission's enforcement of the Act provides inadequate protection of consumers.[66] For this reason, much commentary has proposed that a private right of action should exist under section five of the FTC Act.[67] An alternative method of protecting consumers from celebrity endorsers, however, lies in the evolution of the common law.[68]

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setting forth the said coverage. In the event that said policy is to be cancelled or modified in a manner which would affect the coverage afforded to Celebrity, Advertiser shall send Celebrity written notice thereof at least thirty days prior to such effective date. If Advertiser shall not have given Celebrity evidence satisfactory to Celebrity indicating that Celebrity will continue to be covered by insurance as and to the extent provided in this paragraph, then at any time following such effective date, Celebrity shall have the right to terminate this agreement.

Comments by Michael Rudell, at Harvard-Boston University Seminar on lawyers in filmmaking, at Harvard Law School, Cambridge, Mass. (April 3, 1986). *See also Is It Curtains for Sales Pitch by Stars?*, L.A. Times, May 15, 1978, § 4, at 1, col. 2.

62. The Guides serve only as interpretations of laws which the Commission administers. E. ROCKEFELLER, DESK BOOK OF FTC PRACTICE AND PROCEDURE 104-105 (3rd Ed. 1979).

63. 15 U.S.C. § 45(a)(1) (Supp. 1985). The Act states, "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.*

64. 15 U.S.C. § 57(b) (1975).

65. Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232 (2d Cir. 1974); Holloway v. Bristol-Meyers Corp., 485 F.2d 986 (D.C. Cir. 1973); Carlson v. Coca-Cola, 483 F.2d 279 (9th Cir. 1973). *But see* Guerney v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D. Ind. 1976) (allowing suit based on failure of a business to comply with a cease and desist order which the FTC entered against it).

66. *See* Note, *A Private Right of Action Under Section Five of the Federal Trade Commission Act*, 22 HASTINGS L.J. 1268, 1279 (1971); Note, *FTC Regulation of Endorsements in Advertising: In the Consumer's Behalf?*, 8 PEPPERDINE L. REV. 697 (1981).

67. Note, *A Private Right of Action Under Section Five of the Federal Trade Commission Act*, 22 HASTINGS L.J. 1268, 1272-73 (1971); Note, *FTC Regulation of Endorsements in Advertising: In the Consumer's Behalf?*, 8 PEPPERDINE L. REV. 697 (1981); Note, *Private Judicial Remedies for False and Misleading Advertising*, 25 SYRACUSE L. REV. 747 (1974).

Recognition of a private right of action under the Federal Trade Commission Act would permit plaintiffs to bring actions in federal court free from the minimum $10,000 requirement. Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D. Ind. 1976). Even if a private right of action were recognized under the Act, however, a consumer would not necessarily be able to bring an action against a celebrity-endorser. A private right of action would be predicated upon finding a breach of statutory duty, and although the Act clearly imposes a statutory duty upon the advertiser, it is unclear whether the Act imposes the same duty on an endorser.

68. Much of the commentary proposing a private right of action under the Federal Trade Commission Act gives as a reason the failure of the common law to protect consumers from unfair or deceptive acts or practices in commerce. As one author stated, "While there are possible legal theories for dealing with fraud and misrepre-

V. Common Law Causes of Action

Although both the entertainment industry and the FTC have recognized a celebrity's duty to consumers, no court has ever held a celebrity liable for making an endorsement which caused harm to a consumer.[69] Cases dating back as far as 1902, however, support such theories. For example, in *Walter v. Ashton*,[70] an English case, the defendant advertised its bicycle as "The Times Cycle" and designed its advertisements to look like those of products which the *Times* of London actually endorsed. The court enjoined publication of the advertisements because, it stated, there was a "reasonable probability of *The Times* being exposed to litigation . . . had they not taken steps to disconnect their names from the advertisements . . . ."[71]

Five years later, citing *Walter*, a New Jersey court of equity enjoined a company's use of Thomas Edison's name, picture and certificate in advertisements for its products.[72] The court stated that the possibility of injury to Edison was as great as the injury posed in

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sentation on the part of sellers, they may be unrealistic when applied to unsophisticated consumers, and even where they are theoretically available, without legislation, they require the admittedly slow evolution of the common law." Comment, *An Act To Prohibit Unfair and Deceptive Trade Practices*, 7 Harv. J. on Legis. 122, 147 (1969). *See also* Note, *A Private Right of Action Under Section Five of the Federal Trade Commission Act*, 22 Hastings L.J. 1268, 1272-1273 (1971). These commentaries call for a private right of action against the advertiser. Applying the same right of action against a celebrity-endorser may inappropriately make him a guarantor of the product or service he endorses, because he could unknowingly and nonnegligently participate in an unfair or deceptive act or practice in commerce. Recognition of a common law theory, on the other hand, would at least require fault or negligence as a prerequisite to liablilty.

69. Endorsements by celebritities are sometimes referred to as "testimonials." The terms are for all practical purposes synonymous. *See* Guides Concerning Use of Endorsements and Testimonials In Advertising, 16 C.F.R. § 255.0(a) (1987). The Federal Trade Commission defined an endorsement as:

> [A]ny advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.

Id. § 255.0(b) (1987). The FTC Guides distinguish endorsers of products or services from mere spokesmen, stating that the latter are announcers who are not familiar to consumers except as spokesmen for the service or product which is advertised. *Id.* § 255.0, example 3. Advertisers have used this distinction as a means of avoiding the requirement that the celebrity's endorsement reflect his personal opinions. *Id.* § 255.1(b). Advertisers maintain that if the celebrity acts merely as a spokesman, the FTC standard need not be followed. *Id.* This contention is untenable, however. A celebrity by definition cannot be a mere spokesman. His familiarity to consumers exists for reasons other than his representation of the company which uses him. Westen, *Current Developments in Advertising*, 1 F.T.C. Consumer Protection Law Institute 11, 26 (1980).

70. 2 Ch. 282 (1902).

71. *Id.* at 295.

72. Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 140, 67 A. 392, 393-94 (1907).

Walter.[73] In both *Walter* and *Edison*, the courts referred to the possibility of litigation brought against an endorser, but neither court stated under what theory an endorser would be liable.

Celebrity endorsements are more than simple announcements for advertisers. An announcement amounts to a representation attributable to the endorser.[74] In fact, the FTC Guides permit only nondeceptive, substantiated representations in endorsements.[75] Therefore, an appropriate area in which to explore a cause of action against a celebrity for injury which his endorsement causes is the law of representation[76]—or more precisely, misrepresentation.

Misrepresentations generally fall into three classifications: intentional misrepresentation, negligent misrepresentation, and strict liability.[77] Early cases failed to distinguish between the three. In *Derry v. Peek*,[78] however, the House of Lords made clear that intentional misrepresentation gave rise to an action in deceit.[79] Actions in negligence and strict liability thus developed separately from intentional misrepresentation.[80] The possibility of holding a celebrity liable for an endorsement which results in harm to a consumer will be analyzed in the context of each of these classifications.

A. *Deceit or Fraudulent Misrepresentation*

Can a celebrity be held liable for deceit if he fraudulently induces a consumer to purchase a product or service to the consumer's detriment? Prosser stated that an action for fraudulent misrepresentation would be proven if the plaintiff established that: first, the defendant made a false representation of a material fact; second, that the defendant knew or believed the representation was false; third, that the defendant intended to induce the plaintiff to rely on the misrepresentation; fourth, that the plaintiff justifiably relied on the misrepresentation; and finally, that the plaintiff was damaged as a result of his reliance.[81]

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73. *Id.* at 141, 67 A. at 395.

74. Note, *Liability of Advertising Endorsers*, 2 STAN. L. REV. 496, 499 (1950). *See also* W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 106 (5th ed. 1984) [hereinafter PROSSER].

75. 16 C.F.R. § 255.1(a) (1985).

76. A representation is defined as any conduct capable of being turned into a statement of fact. BLACK'S LAW DICTIONARY 1169 (5th ed. 1983).

77. PROSSER, *supra* note 74, § 107.

78. 14 A.C. 374 (1899).

79. *Id.*

80. PROSSER, *supra* note 74, § 107.

81. PROSSER, *supra* note 74, § 107. *See also* Traylor Eng. & Mfg. Co. v. National Container Corp., 6 Del. 143, 70 A.2d 9 (1949); Broberg v. Mann, 66 Ill. App. 2d 134, 213 N.E.2d 89 (1965); Suburban Properties Management v. Johnson, 236 Md. 455, 204 A.2d 326 (1964); Safety Inv. Corp. v. State Land Office Bd. 308 Mich. 246, 13 N.W.2d 278 (1944); McKay v. Anheuser-Busch, Inc., 199 S.C. 335, 19 S.E.2d 457

What qualifies as a false representation? Consider the following illustrations:

1) Former star quarterback Johnny Unitas' picture and signature are displayed on solicitation brochures for a financial service company, First Fidelity. The brochures, which promote a mortgage investment program, state that First Fidelity offers fully insured investments with a return of as much as 19.56%, and quote Unitas as saying that the people at First Fidelity are his friends.[82]

2) Singer Pat Boone appears on television and says that "Acne-Statin" is superior to other acne remedies. He adds that his four daughters use it to their satisfaction.[83]

3) Actor-singer-cowboy Gene Autry allows a clothing manufacturer to use his name on a child's outfit which looks like the costume he wore on screen. The manufacturer calls the outfit the "Gene Autry Cowboy Suit." In addition, Autry's photograph appears in advertisements for the suit.[84]

4) A tennis star appears in a television commercial swinging a tennis racket through the air. He states that the Acme Brand tennis racket is a good racket for beginners.

In reality, First Fidelity neither insures all of its investments nor offers as high a return as 19.56%;[85] Acne-Statin is totally ineffective at fighting acne and Pat Boone's daughters have never used it;[86] the Gene Autry Cowboy Suit is highly inflammable;[87] and a firmly hit tennis ball will cause the Acme Brand tennis racket to snap in half.

What false representations may be attributed to the celebrities in these illustrations? Clearly, Boone made false representations. Unitas, in contrast, said only that certain people are his "friends," while Autry said nothing. The tennis player arguably stated only an opinion. Thus, one may argue that Unitas, Autry and the tennis star are less culpable than Boone.

Misrepresentation, however, is not confined to spoken or written words. Rather, it extends to "any conduct that amounts to an assertion not in accordance with the truth."[88] With regard to false,

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(1942); RESTATEMENT (SECOND) OF TORTS § 525 (1977) [hereinafter RESTATEMENT].

82. Kramer v. Unitas, No. 83-1324 slip op. (S.D. Fla. 1985).

83. *In re* Cooga Mooga, 92 F.T.C. 310 (1978).

84. *See* Note, *Liability of Advertising Endorsers*, 2 STAN. L. REV. 496 (1950) [hereinafter Note, *Advertising Endorsers*].

85. Kramer v. Unitas, No. 83-1324 slip op. (S.D. Fla. 1985).

86. *In re* Cooga Mooga, 92 F.T.C. 310 (1978)

87. Note, *Advertising Endorsers*, *supra* note 84, at 496.

88. RESTATEMENT, *supra* note 81, § 525 comment b (1977). Tracy Westen, deputy director of the Federal Trade Commission's Bureau of Consumer Protection, maintains that the agency must expand its efforts to assure truthful advertising be-

misleading or deceptive advertising, courts and the FTC focus on the "net impression" of the advertising meassage.[89] The same analysis is appropriate for celebrity endorsements, since they are advertising messages.[90] In fact, the FTC guides expressly state that use of an individual's name, signature, likeness, or other identifying personal characteristics, even without accompanying verbal statements, may cause consumers to believe that the entire message reflects the "opinions, beliefs, findings, or experience" of that individual, and not just those of the advertiser.[91]

By lending their identities to the products and services in the illustrations, Unitas, Autry, and the tennis player, through the overall impression of their endorsements, asserted that they approved of the companies involved and the product or service endorsed. Through their conduct, they further asserted that the other representations in the advertisements were true, and that use of the endorsed products or investment in the endorsed service was safe and effective.[92]

Moreover, characterizing the statements or assertions as mere opinion does not make them nonfraudulent. A celebrity knows that his "opinion" will be as likely to induce consumer action as his "statement of fact."[93] The distinction between opinion and fact also fails because opinions imply underlying facts that justify them.[94] For example, if a famous aging actress endorses a hair coloring, she arguably represents that she has either tried it or has seen its effects on others and knows that it will not cause baldnes. Similarly, by

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yond simply monitoring an advertisement's written or spoken message. *Not Just Words But Hidden Promise: F.T.C. Studies Ad's Non-Verbal Message*, L.A. Times, Oct. 16, 1978, § 3, at 24. *Cf.* FED R. EVID. 801(a) (a statement is an oral or written assertion or nonverbal conduct of a person, if it is intended by him as an assertion).

89. F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1965); Avis Rent A Car v. Hertz Corp., No. 85-7692 slip op. (2d Cir. Feb. 3, 1986); Rhodes Pharmacal Co. v. F.T.C., 208 F.2d 382, 387 (7th Cir. 1953), *rev'd in part on other grounds*, 348 U.S. 940 (1955) (*per curiam*); Lorillard Co. v. F.T.C., 186 F.2d 52, 58 (4th Cir. 1950).

90. 16 C.F.R. § 255.0(b).

91. *Id.*

92. A celebrity should not be held liable for all misrepresentations without exception. For a celebrity to be held liable, the misrepresentation must be one of a material fact. For example, if James Garner stated that he had been driving Mazdas for 15 years, and in fact he had only been driving them for 13 years, the misrepresentation would be immaterial. *See* RESTATEMENT, *supra* note 81, § 538. *See also* R.J. Reynolds Tobacco Co. v. F.T.C., 192 F.2d 535, 538 (7th Cir. 1951); Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958 (1945); Lebeis v. Rutzen, 289 Mich. 1, 286 N.W. 134 (1939). A celebrity should also not be liable for mere puffery, or claims that cannot be measured. *See* Hammer, *FTC Knights and Consumer Daze: The Regulation of Deceptive or Unfair Advertising*, 32 ARK. L. REV. 446, 456 (1978).

93. Prosser recognized liability for fraudulent misrepresentations of "fact, opinion, intention or law for the purpose of inducing another to act . . . ." RESTATEMENT, *supra* note 81, § 525. *See also* Shirreffs v. Alta Canyada Corp., 8 Cal. App. 2d 742, 48 P.2d 55, 58 (1935).

94. Note, *Advertising Endorsers*, *supra* note 84, at 501.

saying a particular tennis racket is good for beginners, the tennis star represents that he has tried the racket or has seen others use it, and knows that it will not break as a result of impact with a firmly hit tennis ball. Arguably, even Gene Autry makes a false representation by suggesting that the cowboy outfit is safe for children.

Moreover, if a celebrity endorses a product or service without facts on which to base his opinion, the opinion itself may amount to a misrepresentation of the celebrity's state of mind.[95] A false representation by itself, however, will not subject a celebrity-endorser to an action in deceit. Knowledge or belief that the representation is false, or "scienter," is also required.[96]

If the requirement of scienter were strictly applied, it would free most celebrities from any liability. It is rare for a celebrity to intentionally deceive a consumer.[97] Courts recognize, however, the doctrine of conscious ignorance as a substitute for actual knowledge.[98] According to this theory, a representation is fraudulent if its maker lacked confidence in the accuracy of his representation,[99] or knew that he lacked the basis for the representation.[100] Scienter may therefore be found when the celebrity makes a representation with reckless disregard for its truth or falsity.[101] Accordingly, the rule applies even when the party making the statements believes them to be true, and has no intention to deceive or defraud the purchaser.[102] Thus, if a celebrity makes an endorsement without any knowledge of the product, service or company represented, he is acting with scienter.

Even if a celebrity's endorsement amounts to a false representation and he knows that he lacks the basis for making such a representation, liability for deceit still requires that the representation be made with the intent to influence the consumer to act—to purchase the good or service endorsed—in reliance on the endorsement.[103] Ce-

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95. RESTATEMENT, *supra* note 81, § 525 comment d. *See also* Note, *Advertising Endorsers*, *supra* note 84, at 501.

96. PROSSER, *supra* note 74, § 197.

97. *See* Kramer v. Unitas, No. 83-1324 slip op. (S.D. Fla. 1985).

98. Sovereign Pochohontas Co. v. Bond., 120 F.2d 39 (D.C. Cir. 1941). *See also* Note, *Advertising Endorsers*, *supra* note 84, at 501.

99. The representation may be stated or implied. RESTATEMENT, *supra* note 81, § 526(a).

100. Sovereign Pochohontas Co. v. Bond, 120 F.2d 39 (D.C. Cir. 1941); Fausett & Co. v. Bullard, 217 Ark. 176, 229 S.W.2d 490 (1950); Hollerman v. F.H. Peavy & Co., 269 Minn. 221, 130 N.W.2d 426 (1964); Zager v. Setzer, 242 N.C. 449, 388 S.E.2d 94 (1955); *See also* PROSSER, *supra* note 74, § 107; RESTATEMENT, *supra* note 81, § 526(b); 37 AM. JUR. 2D *Fraud and Deceit* § 203 (1968).

101. Rosenberg v. Howle, 56 A.2d 709 (D.C. 1948); Richards v. Goss, 126 Me. 413, 139 A. 231 (1927); Atkinson v. Charolette Builders, 232 N.C. 67, 59 S.E.2d 1 (1950).

102. 37 AM. JUR. 2D *Fraud and Deceit* § 201 (1968).

103. *See supra* note 81 and accompanying text.

lebrity endorsements are clearly intended to induce consumer action.[104] Therefore, celebrities who endorse products are "in a poor position to argue [that their] endorsement[s] cannot legally be considered the inducing factor in bringing about [the] sale" of the endorsed product.[105]

In accordance with this view, the American Law Institute ("A.L.I.") maintains that a result is considered "intended" if the actor either acts with desire to cause the result or acts believing that there is a substantial certainty that the result will follow from his conduct.[106] The A.L.I. also stated that "one who makes a fraudulent misrepresentation is subject to liability to the persons . . . whom he intends or has reason to expect to act or refrain from action in reliance upon the misrepresentation . . . ."[107] "Reason to expect" is defined as having information from which a reasonable man would conclude that the result will follow.[108]

But does the consumer have a right to rely on the celebrity's endorsement? Originally, actions in deceit were available only against parties to a contract.[109] Since 1789,[110] however, courts have gradually extended liability to the maker of a misrepresentation whenever he can reasonably foresee that another party will receive the information and act upon it.[111] This includes parties whom the maker of the misrepresentation had no desire to influence, but whose reliance upon the representation there is some special reason to anticipate.[112]

In contrast, in cases in which the maker of the misrepresentation neither intended nor could reasonably foresee that another party would receive the information and act upon it, courts have generally held that no action in deceit lies against the party who made the false assertion.[113] For example, in cases involving remote investors,[114] assignees,[115] subpurchasers,[116] casual bystanders,[117] and

104. *See supra* notes 35-53 and accompanying text.
105. Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969).
106. RESTATEMENT, *supra* note 81, § 531 comment c.
107. *Id.*
108. *Id.* at comment d.
109. PROSSER, *supra* note 74, § 107; Note, *Torts—Misrepresentation—Liability of Certifiers of Quality to Ultimate Consumers*, 36 NOTRE DAME L. REV. 176 (1960).
110. Palsey v. Freeman, 3 Term Rep. 51, 100 Eng. Rep 450 (K.B. 1789) (finding cause of action for deceit where plaintiff had no dealings with defendant, but had been induced by his misrepresentations into extending credit to a person known to be a poor credit risk).
111. PROSSER, *supra* note 74, § 107.
112. *Id.*
113. *Id.*
114. New York Title & Mortgage Co. v. Huton, 71 F.2d 989, (D.C. Cir. 1934), *cert. denied*, 293 U.S. 605 (1934); Greenville Nat'l Bank v. Hardwood Co., 241 Mich. 524, 217 N.W. 786 (1928); Wheeler v. Vanderbilt, 69 Or. 326, 138 P. 857 (1914); Gillespie v. Hunt, 276 Pa. 119, 119 A. 815, *cert. denied*, 261 U.S. 622 (1923).

others not intended nor expected to be affected by the representation[118] liability for deceit has been denied. The reason for disallowing such actions is that the class of persons who might conceivably learn of a misstatement and be influenced by it is so enormous that an impossible burden, likely to be out of proportion to the fault involved, would be imposed upon anyone who made a false assertion.[119]

Nevertheless, when the representor intends to influence a large class of persons, such as consumers, the policy limitation has not been given credence.[120] For example, liability for misrepresentation has been held against those who publish statements in newspapers which are intended to reach a whole class of purchasers or investor;[121] those who furnish information to a credit agency in expectation that the information will be passed on to those with whom they may deal;[122] and those who advertise goods to consumers.[123] Moreover, when the representation is made to a large class of persons, any single individual of that class may bring an action in deceit against the representor.[124]

A related question that opponents of actions against celebrity-endorsers have raised is whether the consumer's reliance upon the representation is justified.[125] One may argue that celebrity endorsements are merely attractive ways of marketing products and that consumers should not reasonably believe that the endorsers know

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115. Pamela Amusement Co. v. Scott Jewelry Co., 190 F. Supp. 465 (D. Mass 1960).

116. Cohen v. Citizens Nat'l Trust & Sav. Bank, 143 Cal. App. 480, 300 P.2d 14 (1956); Bechtel v. Bohannon, 198 N.C. 730, 153 S.E. 316 (1930); Ellis v. Hale, 13 Utah 2d 279, 373 P.2d 382 (1962).

117. Westcliff Co. v. Wall, 153 Tex. 271, 261 S.W.2d 450, *rev'd*, 267 S.W. 2d 544 (1953).

118. PROSSER, *supra* note 74, § 107.

119. Keeton, *The Ambit of a Fraudulent Representor's Responsibility*, 17 TEX. L. REV. 1 (1938).

120. The RESTATEMENT states:

> One who makes a fraudulent misrepresentation intending or with reason to expect that more than one person or class of persons will be induced to rely on it, or that there will be action or inaction in more than one transaction or type of transaction, is subject to liability in any one or more of such transactions.

RESTATEMENT, *supra* note 81, § 534.

121. Willcox v. Harriman Securities Corp., 10 F. Supp. 532 (S.D.N.Y. 1933); Holloway v. Forsyth, 226 Mass. 358, 115 N.E. 483 (1917).

122. Manly v. Ohio Shoe Co., 25 F.2d 384 (4th Cir. 1928); Reliance Shoe Co. v. Manly, 25 F.2d 381 (4th Cir. 1928); Hulsey v. M.C. Kiser Co., 21 Ala. App. 123, 105 So. 913 (1925).

123 Baxter v. Ford Motor Co., 168 Wash. 456, 15 P.2d 1118 (1932).

124. Wennerholm v. Stanford Univ. School of Medicine, 20 Cal. 2d 713, 128 P.2d 522 (1942); Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

125. Note, *Liability of Advertising Endorsers to Third Parties for Negligent Misrepresentation*, 51 OHIO L. REV. 571, 578 (1970).

anything at all about the products endorsed.[126]

This argument fails, however, when a strong nexis exists between the celebrity's area of notoriety and the endorsed product or service. For instance, when a race car driver speaks for the effectiveness of an automotive product, consumers justifiably trust that the driver believes what he says and has personal knowledge sufficient to form that belief.[127] Justifiable reliance on a celebrity endorsement, however, should not be limited to these kinds of endorsements. The product or service need not have any connection to the endorser's specialty to give consumers reason to rely on the endorsement.[128] A consumer may simply assume that the celebrity, who has a reputation as a responsible person, would not associate himself, even for a fee, with a company which provides inferior service or produces inferior or dangerous products.[129] As the Supreme Court stated in *Federal Trade Commission v. Education Society*, "Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception."[130] The Second Circuit Court of Appeals noted,[131] and the FTC reiterated,[132] that representations made by those who command the respect of the public "are not less, but more obnoxious to the law" than those "made directly upon the authority alone of the proprietors."[133]

The American economy has grown more complex, and has consequently become more dependent upon advertising.[134] In a complex business system the consumer has dropped to a more remote position in the economic scheme than ever before.[135] Thus, one reason the consumer may rely on a celebrity's representation is that no other means of differentiating between competing businesses is readily available.[136] The discussion regarding the consumer's right to rely on the endorsement and his justification for so doing should be

126. *See* Note, *Advertising Endorsers*, *supra* note 84, at 503.

127. 16 C.F.R. § 255.0 example 4.

128. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX L. REV. 637, 645 (1973).

129. *Id.*

130. 302 U.S. 112, 116 (1937).

131. United States v. John J. Fulton Co., 33 F.2d 506, 507 (2d Cir. 1929).

132. *In re* American Chemical Paint Co., 45 F.T.C. 9, 27 (1948).

133. *Id.*

134. Note, *Torts—Misrepresentation—Liability of Certifiers of Quality to Ultimate Consumers*, 36 NOTRE DAME L. REV. 176 (1960).

135. *See* Comment, *Negligent Misrepresentation—Product Endorsement*, 4 SUFFOLK U.L. REV. 969, 974 (1970).

136. *Id.* at 975. One commentator suggested that celebrity endorsements give consumers "an opportunity to associate [themselves] with a public figure, however fleetingly and remotely . . . [and] consumers value this association at least unconsciously." Treece, *supra* note 128, at 645.

no more than academic. The celebrity "knows or has reason to know that the [consumer] regards or is likely to regard the [celebrity's endorsement] as important in determining his choice of action, [even if] a reasonable man would not so regard it."[137] The celebrity, after all, is paid to induce consumer action. Imposing a standard of reasonableness on the consumer's reliance penalizes the consumer for doing exactly what the celebrity said he should do. Logic and good sense require that the celebrity be estopped from raising such an argument.[138]

The consumer should, however, be required to prove some reliance on the representation. The celebrity should not be liable for deceit if the plaintiff-consumer purchased the product or service without ever having been exposed to the celebrity's endorsement. On the other hand, once the consumer proves that he viewed or read the endorsement prior to purchasing the product or service, the presumption should be that he relied on the endorsement, since that was its purpose.[139] The defendant-celebrity, however, should retain the opportunity to rebut the presumption.

The final element of a cause of action in deceit is injury to the plaintiff as a consequence of his reliance on the endorsement.[140] Injury to the consumer can be a physical harm[141] or a pecuniary loss.[142] Although early cases which held parties liable despite a lack

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137. The RESTATEMENT provides:

> (1) Reliance upon a fraudulent misrepresentation is not justifiable unless the matter is material. (2) The matter is material if (a) a reasonable man would attach importance to its existence or nonexistence in determining his course of action in the transaction in question, or (b) the maker of the representation knows or has reason to know that the recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

RESTATEMENT, *supra* note 81, § 538.

138. The celebrity could not raise contributory negligence as a defense to fraudulent misrepresentation or deceit. *See id.* § 545A. Contributory negligence is, however, recognized as a defense to negligent misrepresentation. *Id.* § 552A. Nonetheless, in the celebrity-endorsement context, the same reasoning that should bar the celebrity from asserting that the consumer's reliance was unjustified should similarly bar a defense of contributory negligence with respect to the reliance.

139. *E.g.*, *In re* Cooga Mooga, 92 F.T.C. 310 (1978) (requiring that celebrity reimburse those consumers who purchased product during the advertising campaign in which he endorsed the product; no inquiry made about whether those consumers purchased it in reliance on celebrity's endorsement). *See also infra* note 146.

140. *See supra* note 81 and accompanying text.

141 *See* Virginia Dare Stores v. Schuman, 1 A.2d 897, 899 (Md. 1938).

142. The RESTATEMENT provides:

> (1) The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.

of privity emphasized physical harm to the plaintiff,[143] courts have extended liability to cases where plaintiffs are financially harmed as well,[144] as long as the pecuniary loss could reasonably have been expected to result from the reliance.[145]

Returning to the four illustrations discussed at the outset of this section, what consumer injuries could be causally attributed to each celebrity's endorsement?

Johnny Unitas' representations would be the "cause in fact"[146] of a consumer's pecuniary losses suffered from not having a fully insured investment. Pat Boone's representations would be the "cause in fact" for the loss consumers suffered to the extent of the difference in value of an effective acne remedy and "Acne-Statin." The tennis player's representations would be the "cause in fact" of the losses suffered by tennis racket purchasers to the extent of the difference in value between a tennis racket that is "good for beginners" and the one that he endorsed.

Turning to physical harm, Gene Autry's representation would be a "legal cause" for the burn injuries which a child suffered. If the acne remedy endorsed by Boone left permanent scars on the skin of its users, his representation would be the legal cause for such injury. If the tennis racket endorsed by the tennis star snapped in half upon impact with a tennis ball, severing a nerve in the player's wrist, his representation would qualify as the legal cause for that injury.[147]

In theory, then, no barrier prevents an action in deceit from being used against a celebrity endorser.[148] From a practical point of view, however, recognizing that such an action may lie against a ce-

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RESTATEMENT, *supra* note 81, § 549.

143. *See* Van Winkle v. American Steam-Boiler Ins. Co., 52 N.J.L. 240, 247, 19 A. 472, 475 (1890).

144. *See* Comment, *Potential Liability of Non-Manufacturer Certifiers of Quality*, 10 VILL. L. REV. 709, 710 (1965) (comparing physical damage to body or property with financial loss).

145. RESTATEMENT, *supra* note 81, § 548A.

146. The RESTATEMENT provides in pertinent part:

> For a misrepresentation to be a cause in fact of the pecuniary loss that results from the plaintiff's action . . . the plaintiff must have relied upon the misrepresentation in incurring the loss. It is not, however, necessary that his reliance . . . be the sole or even the predominant or decisive factor in influencing his conduct. It is not even necessary that he would not have acted or refrained from acting as he did unless he had relied on the misrepresentation. It is enough that the representation played a substantial factor, in influencing his decision. Thus it is immaterial that he is influenced by other considerations, such as similar misrepresentations from third persons, if he is also substantially influenced by the misrepresentation in question.

Id. § 546 comment b.

147. *See id.* §§ 310, 311.

148. Note, *Advertising Endorsers*, *supra* note 84, at 505.

lebrity will neither subject celebrities to many lawsuits, nor will it provide consumers significant protection, since a celebrity could avoid such an action with minimal effort. All that would be required is that he have an honest reason and some basis for his representation—a standard which presumably most celebrity-endorsers already meet.[149] For example, knowing a company has a good reputation could be a sufficient basis for an honest belief in the truth of a representation concerning a company or its product. Knowledge of such a reputation could indicate that the celebrity neither lacked the confidence in the accuracy of the representations, nor acted with reckless disregard of the truth of such representations.[150]

B. *Negligence or Negligent Misrepresentation*

Negligent misrepresentation differs from deceit in that scienter is not required to expose the representor to liablilty.[151] Instead, failure to act with reasonable care in ascertaining the truth of the representation suffices.[152] Implicit in this theory is the imposition of a duty of reasonable care upon the party making the representation.[153] If such a duty were imposed on celebrities, even representations made with an honest belief in their truth and a basis for that belief would be actionable if such basis was obtained negligently. The other elements of deceit—false representation, inducement, reliance, and injury—would still be required under the doctrine.[154]

Should the celebrity be held to a duty of reasonable care to make an investigation into the truth of any representation he makes? The most common area in which such a duty is found is when a defendant makes statements in the course of his business.[155] The duty, however, need not arise in a contractual setting, nor is privity required. For example, in *Glanzer v Shepard*,[156] a seller of

149. *See supra* notes 96-100 and accompanying text.

150. *See supra* notes 101-102 and accompanying text.

151. International Prods. v. Erie R.R. Co., 244 N.Y. 311, 155 N.E. 662, 664 (1927) (negligent statement may be the basis for recovery of damage).

152. For example, in White v. Guraente, 43 N.Y. 2d 346, 372 N.E.2d 315, 401 N.Y.S. 2d 474 (1977), the New York Court of Appeals stated:

> [A] negligent statement may be the basis for recovery of damages, where there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage, . . . such information is . . . actionable [when] expressed directly, with knowledge or notice that it will be acted upon, to one to whom the author is bound by some relation of duty, arising out of contract or otherwise, to act with care if he acts at all.

Id. at 363, 372 N.E.2d at 319, 401 N.Y.S 2d at 478. *See also* Bivas v. State, 97 Misc. 2d 524, 411 N.Y.S.2d 854 (1978); Richard v. A. Waldman and Sons, Inc., 155 Conn. 343, 232 A.2d 307 (1967); 37 AM. JUR. 2D *Fraud and Deceit* § 208 (Supp. 1985).

153. *Id.*

154. PROSSER, *supra* note 74, § 107.

155. *Id.*

156. 233 N.Y. 236, 135 N.E. 275 (1922).

produce hired the defendant, a public weigher, to certify the weight of beans which the plaintiff purchased. The defendant negligently certified the weight, and the purchaser who was harmed as a result prevailed in a suit against the weigher.[157] The court based its decision in part on the fact that the defendants held themselves out to the public to be careful and skilled in their calling.[158]

In cases dealing with representations concerning potentially dangerous products, courts have imposed a duty of reasonable care independent of a contract.[159] The duty has been imposed simply as part of the general duty not to disregard the safety of others,[160] rather than as a result of an obligation stemming from the representor's business.[161] For example, in *Hempstead v. General Fire Extinguisher Corp.*,[162] a federal district court allowed a negligence action against a defendant that placed its seal of approval on a fire extinguisher which exploded during use.[163] The court relied on section 324A of the *Restatement (Second) of Torts*, which referred to "liability to third parties for the negligent performance of an undertaking."[164]

The case of *Hanberry v. Hearst*[165] provides the greatest support for holding a celebrity-endorser liable for a negligently-given endorsement. In *Hanberry*, the court applied a duty of care standard to an unprecedented area[166] by imposing liability for negligent misrepresentation on an endorser of a product.[167] The Hearst Publish-

157. *Id.*

158. *Id.*

159. Macpherson v. Buick Motor Co., 217 N.Y. 382, 11 N.E. 1050 (1916).

160. *Id.*

161. Such a duty still retains particular application when it is a part of the actor's business. RESTATEMENT, *supra* note 81, § 311 comment b.

162. 269 F. Supp. 109 (D. Del. 1967).

163. Although the court framed the issue in terms of simple negligence rather negligent misrepresentation, its reasoning applies equally to the theory of negligent misrepresentation. The major difference between the two theories is that for simple negligence, reliance by the injured party need not be shown to sustain recovery. Reliance is, however, required under the theory of negligent misrepresentation. Thus, with respect to celebrity endorsements, framing the issue in terms of simple negligence could prove more effective to an injured consumer, because it would shift the court's focus from the plaintiff's conduct to the defendant's conduct. In such a case, reliance would be subsumed in the issue of proximate cause. If the consumer did not rely on the celebrity's endorsement, that endorsement could not reasonably be considered the proximate cause of the consumer's injuries. *See* Rottinghaus v. Howell, 35 Wash. App. 99, 666 P.2d 899 (1983).

164. RESTATEMENT, *supra* note 81, § 324A (1965).

165. 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969).

166. *See* Comment, *Negligent Misrepresentation—Product Endorsement*, 4 SUFFOLK U.L. REV. 969, 975 (1970).

167. *Hanberry*, 276 Cal. App. 2d at 680; 81 Cal. Rptr. at 519. *See also* Rottinghaus v. Howell, 35 Wash. App. 99, 666 P. 2d 899 (1983) (where defendant-preparer of seed directory which was designed to induce sales and did induce sales by certifying particular seed certified defective seed, his conduct created issue for jury as to liability for negligence and negligent misrepresentation); Yuhas v. Mudge, 129 N.J.

ing Company had given a line of shoes its "Good Housekeeping Seal of Approval."[168] The plaintiff slipped and injured herself while wearing a new pair of the shoes.[169] Citing section 311 of the *Restatement (Second) of Torts*,[170] the court ruled that because the plaintiff had relied upon the defendant's seal, believing that the shoes had been examined and tested, she could recover for the defendant's negligence in putting its seal of approval on defectively designed shoes.[171] The court in *Hanberry* held that implicit in the defendant's seal was a representation that it had taken reasonable steps to independently examine the product, and had found the product satisfactory.[172] The court also held that because the purpose of the seal was to attract consumers, Hearst could have foreseen that certain consumers would rely on the representation and purchase the shoes.[173] By voluntarily lending its name to the shoes, "Hearst . . . placed itself in the position where public policy imposes upon it the duty to use ordinary care in the issuance of its seal . . . so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm."[174]

Similarly, by endorsing products and services in the mass media, celebrities place themselves in positions in which public policy should impose upon them the duty to use ordinary care in issuing those endorsements.[175] Celebrity-endorsers, like certifiers of quality, intend to induce consumer action, and they should foresee that con-

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Super 207, 322 A.2d 824, 825 (1974) (although magazine publisher held not liable for injury sustained due to fireworks purchased by other defendant through paid advertisement, the court suggested that publisher could be held liable if it had endorsed the product).

168. *Id.*

169. *Id.*

170. Section 311 provides:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other, or
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.
>
> (2) Such negligence may consist of failure to exercise reasonable care
>
> (a) in ascertaining the accuracy of the information, or
>
> (b)in the manner in which it is communicated.

RESTATEMENT, *supra* note 81, § 311.

171 *Hanberry*, 276 Cal. App. 2d at 683, 81 Cal. Rptr. at 523.

172. *Id.* at 682, 81 Cal. Rptr. at 522.

173. *Id.*

174. *Id.*

175. *See* Banker's Trust Co., Etc. v. Steenburn, 95 Misc. 2d 967, 971, 409 N.Y.S.2d 51, 67 (1978). In *Banker's Trust*, the court stated,

> [W]here one makes a statement with knowledge that the statement is required for a serious purpose, and that it is made for the benefit of another person, who is expected to rely upon it and may be damaged if it is false, the person making such statement is under a duty to the person[s] expected to rely upon it, to exercise reasonable care that the statement is correct.

sumers will rely on their representations.

The most recent support for imposing an affirmative duty upon celebrities who choose to exercise their right of publicity by endorsing products are two consent decrees which the FTC issued.[176] In one case, former astronaut Gordon Cooper falsely claimed in a series of television and newspaper advertisements that a product increased engine performance, reduced smog emission, and cleared a car's engine.[177] In addition to finding that these claims had the tendency to mislead the public,[178] the FTC held that since Cooper did not qualify as an expert in automobile engineering, he should have sought an expert's opinion.[179] The final consent order required that Cooper cease to endorse any product or service as an expert unless he relied on competent scientific evidence as a basis for his representation.[180] The Commission also held that when Cooper chose to endorse a product or service as a non-expert, he should first make a "reasonable inquiry into the truthfulness of his endorsement."[181]

The second case indicating the Commission's readiness to impose upon a celebrity-endorser a duty of care was *In re Cooga Mooga*.[182] In *Cooga Mooga*, singer Pat Boone endorsed both on television and in print advertisement an acne medicine, and stated that his daughters used it.[183] The FTC complaint alleged that the product was neither superior to competing brands, nor did Boone's daughters use it.[184] The final consent order to which Boone agreed closely resembled the *Gordon Cooper* agreement. Boone agreed not to endorse the efficacy of an acne product or any other product unless he made "a reasonable inquiry into the truthfulness of a proposed endorsement"[185] and relied upon "information from reliable sources independent of the advertiser or other parties with an interest in the product or service which is the subject of the endorsement."[186] Neither the Cooper nor the Boone order were binding on other celebrity-endorsers because the orders resulted from negotiations, not judgments.[187] The decisions, however, indicate that the FTC is willing to impose a duty of reasonable inquiry on endorsers.

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176. *In re* Leroy Gordon Cooper, Jr., 94 F.T.C. 674 (1979); *In re* Cooga Mooga, 92 F.T.C. 310 (1978).
177. *In re* Leroy Gordon Cooper, Jr., 94 F.T.C. 674 (1979).
178. *Id.*
179. *Id.*
180. *Id.* at 696.
181. *Id.* at 697.
182. 92 F.T.C. 310 (1978).
183. *Id.*
184. *In re* Cooga Mooga, 92 F.T.C. 310, 321 (1978).
185. *Id.* at 316.
186. *Id.* at 321.
187. Krakow, *Cause Celebre and the Celebrities*, 50 ADVERTISING AGE S1, S16 (July 30, 1979).

In *Cooper* the Commission defined "reasonable inquiry" as:

> (1) obtaining information from at least two competent and reliable sources independent of the advertiser and anyone with an economic interest in the product or service; or
>
> (2) having information obtained from the advertiser or anyone with an economic interest in the product or service evaluated by at least two independent, competent and reliable sources.[188]

In *Cooga Mooga*, the Commission did not define "reasonable inquiry" as specifically. It did, however, draw a distinction between endorsements for those products related to the health and safety of consumers and those not intended for such use.[189] The Commission stated that for the latter Boone could rely on personal experience, as long as the endorsement did not require professional expertise and the product could be reasonably evaluated through lay use.[190]

The test of what constitutes a "reasonable inquiry" should remain flexible, and be left to a jury to decide. In addition to health and safety of consumers, expert status of the celebrity, and ability of the celebrity to examine the product through lay use, various additional factors should also be considered in determining what is a reasonable inquiry. These may include the size and current reputation of the company whose product or service the celebrity endorses. For example, an inquiry into a product manufactured by a well-established corporation with a good reputation need not be as deep as an inquiry into a product sold by a small mail order company.[191] Another factor which should be considered is the length of time the product has been present in the marketplace. A celebrity's inquiry into a new product or service could well require a more detailed investigation.[192] A third factor should be the cost of the product or service. As the consumers' investment increases, so too in many cases should the depth of the celebrity's inquiry. The sophistication of the target audience should also be considered.[193] As the target audience becomes less sophisticated, the celebrity's duty should rise. For example, Jack Klugman's responsibility in making an inquiry into Cannon copiers should not have to be as great as Sylvester Stallone's inquiry into toy flame throwers. Finally, a reasonable inquiry analysis should also take into account the specificity of the represen-

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188. *Cooper*, 94 F.T.C. at 697.

189. *Cooga Mooga*, 92 F.T.C. at 321.

190. *Id.* at 321.

191. Krakow, *Cause Celebre and the Celebrities*, 50 ADVERTISING AGE S16 (July 30, 1979).

192. *Is It Curtains for Sales Pitch by Stars?* L.A. Times, May 15, 1978, § 4, at 1, col. 2.

193. *See, e.g.*, Kalwajtys v. F.T.C., 237 F.2d 654, 656 (7th Cir. 1956); *In re* Hudson Pharmaceutical Corp., 89 F.T.C. 82 (1975) (use of Spiderman to endorse vitamins resulted in consent order issued by Commission).

tation. As the endorsement becomes more specific, the law should impose upon the celebrity a duty to make a more pointed inquiry.[194]

Recognition of an action for negligent misrepresentation against celebrities who fail to make reasonable inquiries into the truth of their endorsements represents merely a legal embodiment of already existing administrative rules and common industry practice. Under current administrative rules, celebrities are required to base endorsements on their honest opinions, findings, or experience.[195] Furthermore, when they represent that they use a product, they must in fact do so.[196] Reasonable inquiry is not a tremendous burden on the celebrity who wishes to exercise his valuable right of publicity.[197] For instance, if a celebrity chooses to endorse a mutual fund, he can look it over as any reasonable investor would; if he chooses to endorse a car, he can test drive it; and if a celebrity endorses a product which requires expert investigation, he can collect information from competent and reliable sources independent of the advertiser. Moreover, personal use of the endorsed product would almost always satisfy a reasonable inquiry standard.[198] Finally, from a strictly economic point of view, because advertisers already pay celebrities thousands and sometimes millions of dollars for endorsements, the cost of a reasonable investigation by the celebrity will probably not discourage advertisers' use of celebrities.[199]

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194. In Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958), the Supreme Court of California recognized a need for flexibility in determining whether a representor was liable for negligent misrepresentation. The court stated, "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors." *Id.* at 650, 320 P.2d at 19. These factors included the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered an injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. *Id.*

195. 16 C.F.R. § 255.1(a).

196. *Id.* § 255.1(c).

197. Albert H. Kramer, director of the FTC's Consumer Protection Bureau, stated that "because a person who endorses a product may benefit as much as the manufacturer from false advertising, it is not unreasonable to obligate him to ascertain the truthfulness of the claims he is being paid to make." *Boone's Acne Ads Spotty, FTC Says*, L.A. Times, May 12, 1978, § 1, at 6, col. 1.

198. *Is It Curtains for Sales Pitch by Stars*?, L.A.Times, May 15, 1978, § 4, at 1, col. 2. According to Albert H. Kramer, "[I]f [a] celebrity said I use this product and I like it, and in fact that was true [he or she] would have some reasonable basis for saying it." *Id.*

199. In 1978, following the FTC's *Cooga Mooga* consent decree, Marty Ingels, a self-proclaimed celebrity broker, said, "It is going to be tough to get a celebrity to do a commercial from now on." *Is It Curtains for Sales Pitch by Stars?* L.A. Times, May 15, 1978, § 4, at 1, col. 2. Ingels' prediction clearly proved to be wrong. Just as the *Cooga Mooga* consent decree did not discourage the use of celebrity endorsements, neither would recognition of a cause of action for a celebrity's negligent misrepresentation.

C. *Strict Liability*

What if a celebrity makes a reasonable inquiry into the truth of his representations, but a consumer who relies upon it is harmed nonetheless? May the consumer hold the celebrity-endorser liable under the theory of strict liability? Under products liability law, strict liability may be imposed under either the doctrine of breach of express warranty, or strict tort liability.[200] Both theories encompass liability without fault and without privity.[201]

Under the theory of breach of express warranty, a seller who makes a misrepresentation of a material fact "concerning the character or quality of a chattel sold by him"[202] is strictly liable for physical harm "to a consumer of the chattel caused by justifiable reliance upon the misrepresentation."[203] Liability is imposed regardless of whether the misrepresentation was made fraudulently or negligently, or whether the consumer had entered into a contractual relation with the seller.[204]

Under the theory of strict tort liability, no proof of the representor's negligence is necessary.[205] It differs from breach of express warranty because neither the making of a representation nor reliance by the consumer need be proven to impose liability.[206]

Because a celebrity's endorsement of a product essentially amounts to a representation that a product is safe for ordinary use, liability arguably may be imposed for breach of express warranty to a consumer who sustains personal injuries through reliance on the representation.[207] In addition, in view of the celebrity-endorser's participation in introducing a product to the marketplace, the law could impose an obligation similar to that imposed on manufacturers.[208]

There are two policy reasons for imposing strict liability. The

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200. Note, *Liability of Certifiers of Products for Personal Injuries to the User or Consumer*, 56 CORNELL L. REV. 132, 138 (1970) [hereinafter Note, *Certifiers Liability*]. *See also* PROSSER, *supra* note 74, §§ 97-98; Comment, *The Liability of the Product Endorser*, 45 MISS. L.J. 1022, 1031 (1974).

201. *See* Note, *Certifier Liability*, *supra* note 200, at 138.

202. RESTATEMENT, *supra* note 81, § 402B.

203. *Id.* In contrast, strict liability for innocent misrepresentation for pecuniary loss has been limited to sale, rental, or exchange transactions between the plaintiff and the defendant. *Id.* § 52 comment c. Furthermore, as the RESTATEMENT notes, "The law appears to be still in a process of development, and the ultimate limits of liability are not yet determined." *Id.* § 52 comment g.

204. *Id.* §§ 402B(a), 402B(b).

205. Comment, *The Liability of the Product Endorser*, 45 MISS. L.J. 1022, 1032 (1974).

206. RESTATEMENT, *supra* note 81, § 402A comment m.

207. *See* Carlin, *Liability of the Product Endorser*, 15 N.Y.L.F. 835, 844-845 (1969); Note, *Certifiers Liability*, *supra* note 200, at 141.

208. Note, *Certifiers Liability*, *supra* 200, at 141.

first is that strict liability will induce those who exercise control over the production and distribution of goods to use more care.[209] The second is that imposition of liability spreads the risk of injury to the public, because it forces representors to acquire liability insurance and insurance costs are reflected in higher prices. [210] Thus, injured parties are not forced to bear the entire burden of the cost of their injuries.[211]

Courts have applied both rationales to manufacturers of defective products.[212] Courts have also subjected wholesalers, distributors, and retail sellers to strict liability, because, like manufacturers, they play major roles in the production and distribution of goods and they exercise control over goods before sending them.[213] As the California Supreme Court stated in *Vandermark v. Ford Motor Co.*,[214] "Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."[215] The court also held that imposition of strict liability was proper since retailers are in "a position to exert pressure on the manufacturer" to insure a product's safety.[216]

The often cited case of *Kasel v. Remington Arms*,[217] supports recognition of the greatest range of potential defendants in a strict products liability action. In *Kasel*, the court adopted a "stream-of-commerce" approach.[218] It stated:

> It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship . . . with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for imposition of strict liability.[219]

In dictum suggesting that the *Hanberry* decision could warrant reevaluation, the *Kasel* court proposed that a product endorser be subject to strict liability when the defendant is responsible for in-

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209. *Id.*
210. *Id.* at 142.
211. *Id. See generally* PROSSER, *supra* note 74, § 494-96.
212. Annotation, *Product Liability—Strict Liability in Tort*, 13 A.L.R. 3D 1057, 1098 (1967).
213. *Id.* at 1098. *See also* RESTATEMENT, *supra* note 81, § 402A comment f, which states that the doctrine of strict liability in tort applies to any person engaged in business of selling products for use or consumption.
214. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
215. *Id.* at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899. *See also* Tauber-Arons, Etc. v. Superior Court, 101 Cal. App. 3d 268, 274-75, 161 Cal. Rptr. 789 (1980).
216. *Vandermark*, 61 Cal. 2d at 256, 391 P.2d at 168, 37 Cal. Rptr. at 896.
217. 101 Cal. Rptr. 314, 24 Cal. App.3d 711 (1972).
218. *Id.*
219. *Id.* at 323, 24 Cal. App. 3d at 726.

ducing the plaintiff to purchase the product.[220]

Application of the stream-of-commerce approach to strict liability has enabled courts to hold franchisors and trademark licensors strictly liable for defective products which their franchisees or licensees sold.[221] The *Kasel* court stated, "[A]s long as the franchisor or trademark licensor can be said to be a link in the marketing enterprise which places a defective product within the stream of commerce there is no reason in logic for refusing to apply strict liability in tort to such an entity."[222] The *Kosters* court considered four factors relevant in extending strict liability to franchisors. The first was that a serious risk was created by approving for distribution an unsafe product likely to cause injury.[223] The second was that the franchisor had both the ability and the opportunity to eliminate the unsafe character of the product and prevent the loss.[224] Additionally, the court considered the consumer's lack of knowledge of the danger.[225] Finally, the court extended liability because the consumer relied on the trade name, which gave the intended impression that the franchisor was responsible for and stood behind the product.[226] Thus, liability was derived from the franchisor's apparent control, and the public's assumption that the franchisor did in fact control and vouch for the product.[227]

Although the public may reasonably assume that a celebrity-endorser, like a franchisor or trademark licensor, has examined and does vouch for a product, maintaining that he actually has the ability to control the distribution of the product, and eliminate its unsafe characteristics, presents greater difficulties. Franchisors and trademark licensors, unlike product endorsers, engage in organized and continuing operations of supplying products and services to the public. A product endorser, on the other hand, only supplies information to the public regarding available products. He exercises no direct control over the production or distribution of the goods.[228]

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220. *Id.* at 324, 24 Cal. App. 3d at 727.

221. *Id.* at 323, 24 Cal. App. 3d at 726. *See also* Kosters v. Seven Up Co., 595 F.2d 347, 351-52 (6th Cir. 1979); Gizzi v. Texaco, Inc., 437 F.2d 308 (3rd Cir. 1971); Smith v. Ford Motor Co., 392 N.E.2d 1287, 1294 (Ohio 1978).

222. *Kasel*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 323.

223. *Kosters*, 595 F.2d at 353.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. In general, the doctrine of strict liability does not apply to the rendition of services as opposed to the sale of goods. *See* Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967) (recovery limited to injuries resulting from latent defect in equipment); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954) (blood furnished to patient is a service not a sale, therefore an action for injury resulting from transfusion could not be brought against hospital in warranty); Aegis Productions, Inc. v. Arriflex Corp. of America, 25 A.D.2d 639, 268

Moreover, because the number of celebrities available to give endorsements is large and the sums of money advertisers are willing to pay a celebrity for promoting its products are equally great, the celebrity has little power to exert pressure on the manufacturer to ensure the product's safety.[229] Similarly, since the celebrity-endorser only stands in a position collateral to the flow of commerce,[230] rather than in the direct line of commerce, he does not have the opportunity to spread the risk of loss to the purchasing public.[231]

In conclusion, holding a celebrity-endorser subject to strict liability for a harm caused by a product he endorsed would place an unfair burden on the celebrity by imposing liability without fault. Further, it would fail to serve either underlying rationale for imposing strict liability. The celebrity-endorser is not responsibile for the introduction of the product into the market. Consequenlty, no financial incentive is created to manufacture safer goods. In addition, the celebrity-endorser does not stand directly in the stream of commerce, where he can exercise control over a defective product and spread the risk of loss to consumers. Finally, actions for negligent misrepresentation and deceit provide consumers adequate protection against a celebrity-endorser's misrepresentations.[232]

N.Y.S.2d 185, 187 (1966) (limiting warranties to sales of goods, not to performance of services).

229. Comments by Felix A. Kent at Boston University School of Law, Boston, Mass. (Mar. 19, 1986).

230. Comment. *Potential Liability of Non-Manufacturer Certifiers of Quality*, 10 VILL. L. REV. 709, 717 (1965).

231. The opinion in *Hanberry v. Hearst* illustrated a court's refusal to extend strict liability to product endorsers. The court stated:

> While we have held appellant has stated a cuase of action for negligent misrepresentation against Hearst, we reject her contention she may also proceed under warranty or on the theory of strict liability in tort . . . . To invoke either theory of recovery here would subject respondent to liability not warranted by the circumstances . . . . The most that can be implied from respondent's representation is that it has examined or tested samples of the product and found the general design and material used to be satisfactory. Application of either warranty or strict liability in tort would subject respondent to liability even if the general design and material used in making this brand of shoe were good, but the particular pair became defective through some mishap in the manufacturing process. We believe this kind of liability for individually defective items should be limited to those directly involved in the manufacturing and supplying process, and should not be extended through warranty or strict liability to a general endorser who makes no representation it has examined or tested each item marketed.

276 Cal. App. 2d at 688, 81 Cal. Rptr. at 524. Note, however, that since the endorser's representation presumably applies only to the general line of products rather than each individual item, the *Hanberry* opinion failed to account for the possibility of holding a product endorser strictly liable only for class defects. Carlin, *Liability of the Product Endorsers*, 15 N.Y.L.F. 835 (1969).

232. The Restatement would allow recovery for pecuniary loss caused by a defendant's innocent representation. RESTATEMENT, *supra* note 81, § 552C comment d. It also states that the rule "does not apply in favor of a third person who is not a party to the transaction, even though he acts according to expectations in taking ac-

VI. Damages and Other Tortfeasors

A celebrity's endorsement can proximately cause physical injury, pecuniary loss, or a combination of the two.[233] The celebrity-endorser, however, is never the sole party liable to the injured consumer, nor presumably the most culpable. Responsibility clearly lies with the advertiser-manufacturer or advertiser-seller, and may also extend to the advertising agency.[234]

The question thus arises whether the celebrity-endorser should be held jointly and severally liable for the full extent of the damages, or whether the damages should be apportioned in some manner. Prosser stated that this question "is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to two or more causes."[235] He also stated that a defendant's liability should be limited to the harm he has caused, when apportionment of harm can be made on a logical basis.[236] Codifying the general rule, section 433A of the *Restatement (Second) of Torts* provides: "Damages for harm are to be apportioned among two or more causes where there are distinct harms, or there is a reasonable bases for determining the contribution of each cause to a single harm. Damages for any other harm cannot be apportioned among two or more causes."[237]

When a celebrity's endorsement causes harm to a consumer, a division can be made of the causes of the consumer's harm. The celebrity caused the injury by making a misrepresentation, but the manufacturer or seller is also responsible because it introduced a defective product or ineffective service into the stream of commerce. Whether these two distinct causes, however, can be split into two distinct harms presents a more difficult question. One may argue that the harm caused by the celebrity-endorser is only the consumer's initial investment in the product or service, but the harm caused by the advertiser-seller extends to all other consequential and incidental damages, in addition to the consumer's investment. Such an argument, however, is contrary to the entire body of the law of misrepresentation, which holds the misrepresentor liable not only for the pecuniary loss incurred by his investment, but also for any additional pecuniary loss suffered as a consequence of reliance on

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tion or refraining from it in reliance upon the misrepresentation. The third person may recover only if the misrepresentation is fraudulent or negligent . . . ." *Id.*

233. Restatement, *supra* note 81, §§ 310, 549(1).

234. Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374 (1969).

235. Prosser, *supra* note 74, § 52.

236. *Id.*

237. Restatement, *supra* note 81, § 433A.

the misrepresentation,[238] and for any physical harm resulting from such reliance.[239] Moreover, the investment in the product or service itself is not the consumer injury. The injury only results when the product or service proves defective or harmful. Therefore, the two distinct causes combine to result in the same indivisible harm to the consumer. Thus, outside of statutory exception,[240] each defendant should be held jointly and severally liable for the entire harm.[241]

On its face, this rule may appear unduly harsh to the celebrity-endorser, but the rule should protect injured plaintiffs rather than tortfeasors[242] by making all wrongdoers jointly liable for all damages suffered. The rule does not allow a situation where a plaintiff is unable to collect a part of the amount needed to compensate him because it had been assessed solely against an insolvent defendant.[243]

Moreover, the celebrity who has a judgment rendered against him is not an innocent victim, and is not left without recourse. The celebrity has a right to indemnity against the advertiser either by contract[244] or as a matter of law. In addition, because the celebrity maintains a solid bargaining position with the advertiser, he can protect himself against an advertiser's subsequent insolvency by requiring that the advertiser take out insurance on his behalf prior to his endorsement of the product.[245]

Finally, one must remember that only the celebrity who fails to make a reasonable inquiry into the truth of his representations prior to endorsing a product or service should be subject to any liability. Joint and several liability is not too harsh because it should only apply to those defendants who act negligently or fraudulently.

VII. Conclusion

Over the last eighty years, supported by advances in technology and increases in leisure time, a new figure has emerged and has assumed a dominant position in society. This figure is the celebrity. In response to his emergence, the law, through the development of the right of publicity, recognizes that his position in society gives him great pecuniary value in his identity, and enables him to exercise his

238. *Id.* § 549(1).

239. *Id.* §§ 310, 557A.

240. *See* Annotation, *Propriety and Effect of Juries' Apportionment of Damages As Between Tortfeasors Jointly and Severally Liable*, 46 A.L.R. 4th 807 § 4[b].

241. Edmonds v. Compagnie Generale Translantique, 443 U.S. 256 (1979); Pease & Elliman Realty Trust v. Gaines, 160 Ga. App. 125, 286 S.E.2d 448 (1981).

242. Annotation, *Propriety and Effect of Juries' Apportionment of Damages As Between Tortfeasors Jointly and Severally Liable*, 46 A.L.R. 4th 801 (1972).

243. *Id.*

244. S. Speiser, C. Krause, & A. Gans, The American Law of Torts § 3:10, at 405.

245. *Id.* § 3:25, at 479-80.

influence and power over the public to a great extent. This is most evident in the realm of advertising, where manufacturers pay celebrities millions of dollars to endorse many products and services to induce consumer action.

The right of publicity has expanded, as has the use of the celebrity endorsement, but the common law has not kept pace with this growth. Although the value of a celebrity's identity has received recognition, the common law has not fully responded to the changing situation. Instead, it has allowed a gap to form with respect to the general duty that one act in a nonnegligent fashion. As the law now stands, a celebrity can knowingly and negligently induce consumer action, and the consumer harmed thereby has no recourse against the celebrity.

Because celebrities know that lending their names and identities to products and services will induce consumer action, public policy should impose upon them a duty of reasonable care in making endorsements. It must be emphasized, however, that imposing such a duty would not make celebrities guarantors or insurers of the products or services they endorse. Only those who negligently or fraudulently give endorsements should expose themselves to liability. A celebrity acts negligently when he endorses a product or service without making a reasonable inquiry into the truth of his representations, or into the veracity of the people whom he endorses. A celebrity acts fraudulently when he endorses a product or service knowing that his representations are untrue. Thus, when a celebrity conducts a reasonable inquiry, he will not be liable, even if use of the endorsed product or service causes consumer injury. But when no such inquiry is conducted, courts should not hesitate to accept what the industry considers apparent, and impose liability on the celebrity-endorser.