The Right(s) of Publicity in California: Is Three Really Greater Than One?

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I. INTRODUCTION

Ours is a country in love with its stars. Whether they exist in the world of music, sports, movies, television, or even politics, people who have achieved a certain level of notoriety in these fields receive unparalleled attention from the public. While the focus of public attention is largely on their professional endeavors, many "celebrities" are also regularly inundated with inquiries into their personal lives, and asked to give their "endorsement" to various products and services.[1]

Most celebrities gladly welcome the chance to give out endorsements. While celebrities ostensibly gain personal satisfaction by lending their opinion and approval to a product or service because it may aid the public in making economic choices, endorsements can also be very lucrative for some celebrities.[2] Public interest in the

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[1] The idea of "endorsement" includes here any use of the celebrity's persona, such as a name or photograph, to indicate approval from one with whom the public can identify, whether to help sell a product or otherwise.

[2] Indeed, some celebrities can make more money from endorsements than from their work as a professional. Michael Jordan is one example. *See* Bruce Horovitz, *Wishing on a Star: Celebrity Endorsements Draw Big Bucks—But Do They Work?*, L.A. TIMES, Nov. 7, 1993, at D1 (stating that Michael Jordan earns $36 million annually in product endorsements).

celebrity's private life, however, is usually less well-received. Most celebrities accept the fact that in choosing their vocation they have voluntarily thrust themselves into the "public eye"; however, most would also agree that certain aspects of their lives are not legitimate news, but rather thinly veiled attempts to sell a "product."[3]

Over the past 30 years, courts and legislatures have begun to recognize that there are substantial interests, economic and otherwise, involved in the commercial appropriation of various aspects of an individual's identity or "persona." California has been one of a few jurisdictions on the forefront of protecting the individual's commercial interest in persona, an interest that has been consistently labeled the "right of publicity."[4] Unfortunately, however, the development of the right of publicity in California has been sluggish, disjointed, and largely accidental. The three separate rights of publicity that have emerged—two statutory and one at common law—reveal the absence of a clear plan by the California courts or legislature to define the new right in a simple, or at least consistent, fashion.

The three separate rights of publicity in California are indeed inconsistent with one another. The inconsistencies lie in three important categories: (1) the breadth of protection given to different aspects or "indicia" of persona; (2) certain uses of persona that are specifically exempted from liability; and (3) the depth of a court's inquiry into assessing whether the persona has been commercially appropriated. Working under the common law, courts have allowed broad protection of the right of publicity in instances where there is a clear showing of a "primary message" of commercial appropriation. Essential to this approach, the courts seem willing to at least give plaintiffs the opportunity to argue that their persona has been

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[3] The news media today is as much a competitive part of the economy as any other market entity. Sensational news stories are being used more and more in newspapers and television programming, not so much for the purpose of disseminating factual news, but to capture the attention of the public.

[4] A hallmark of the right of publicity, as distinguished from privacy rights, is the emphasis on commercial damage to the individual rather than personal or emotional injury. *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 834, 603 P.2d 425, 437 (1979) ("The appropriation of [persona] . . . intrudes on interests distinctly different than those protected by the right of privacy.").

commercially appropriated, even in the face of a defense on constitutional grounds.

The two statutes aimed at the right of publicity enacted by the California legislature, on the other hand, are not as adaptive to different situations in which commercial appropriation of persona may occur. First, statutory protection is strictly limited to five specific indicia of persona. Second, the statutes severely limit a court's inquiry into the extent of commercial appropriation, actually foreclosing such inquiry when the use of persona takes certain forms, such as "news" or "public affairs." The more recently enacted statute, concerning appropriation of deceased personalities, limits a court's inquiry even further by specifically exempting certain uses of persona.

While inconsistency itself is not necessarily bad, there is no reason for the three inconsistent rights of publicity. The justifications and policies supporting protection of the right of publicity are the same, or should be the same, in each of the three situations that California lawmakers have decided to treat differently. The right of publicity is aimed generally at ensuring that individuals are compensated for the appropriation of their persona for another's commercial advantage. While, according to some, the question of whether the individual deserves compensation in these situations is still disputed,[5] the courts, legislature, and many commentators have justified the right of publicity on several grounds—moral, economic, and what can be called distributional and consumer protection justifications. None of these grounds supports distinctions between the right of publicity doctrines based on the aspects of persona appropriated, or the form in which that appropriation takes place.

The problem is that the justifications for the right of publicity are being compromised by the disparate structure and application of the three separate laws in the right of publicity arena. For example, if a commercial user appropriates a voice "sound-alike"[6] of a famous singer, the two statutes offer no protection to the plaintiff, because

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[5] *See* discussion *infra* part III(F).

[6] A "sound-alike" is created when the singing voice and style of a familiar singer is imitated by someone else to sound exactly like that singer.

what has been appropriated is not a recognized aspect of persona, namely the plaintiff's actual voice. Under the common law, however, the plaintiff may argue, as some artists have done successfully,[7] that the voice used resembles the plaintiff's distinctive voice so closely that the defendant can be said to have appropriated a distinct aspect of the plaintiff's persona. Finally, if the famous singer is no longer alive, the California statute for deceased personalities, Civil Code section 990, would immediately foreclose any appropriation inquiry by a court if the voice is used in a particular manner that falls within the statute's exemptions, such as a musical composition or a play.

The purpose of this Comment is to suggest reform in right of publicity doctrine. The statutory and common law rights of publicity have developed largely independently from one another, and are applied inconsistently to situations that can and should be approached in the same manner. The exemptions codified in the statutory rights are simply too strict, and present unreasonable obstacles to plaintiffs seeking to assert their right of publicity. The stringent statutory tests for liability have also stifled progress toward a more unified theory of the right of publicity. This has been especially unfortunate because the right of publicity is still a very new doctrine with very little case law. The courts certainly have not yet faced all of the situations in which the right of publicity may be actionable. Therefore, at this point it seems unwise to handcuff judges attempting to do justice in individual cases with the rigid framework of the two statutes.

Part II of this Comment traces the development of the right of publicity from the law of privacy and beyond, showing how the three separate rights emerged largely by accident and certainly without an articulated goal of defining a single, clear right. Part III explains the policies that justify the right of publicity, showing how those policies are unreasonably compromised under the current scheme. Finally, Part IV suggests how the differences between the three separate rights of publicity should be resolved under one right, noting that the differences really amount to inconsistent definitions of what should be the same right. This discussion proposes that the more balanced "primary message" inquiry prescribed under the common law is the

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[7] *See infra* note 43 and accompanying text.

correct approach, and should be codified by the California legislature. One statute should replace and preempt the three existing doctrines, and while many of the definitional and procedural provisions contained in the two present statutes may be retained, the strict exemptions and specific aspects of protected persona should be abandoned.

II. FROM RIGHTS OF PRIVACY TO PUBLICITY: THE ACCIDENTAL DEVELOPMENT OF THREE SEPARATE RIGHTS OF PUBLICITY IN CALIFORNIA

The development of what has come to be known in current legal doctrine as the right of publicity began within the framework of the common law of privacy. Tracing its origins to a historical article written by Samuel Warren and Louis Brandeis in 1890,[8] and the seminal decision of the New York Court of Appeals in *Roberson v. Rochester Folding Box Co.*,[9] the right of privacy gradually developed into various statutory and common law forms.[10] Today, over half the states recognize the right of publicity as law, under either statutory or common law.[11]

California has been one of the leading states, if not the leading

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[8] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis emphasized that the demands of society required the law to grow with it and recognize a new right of privacy. The authors seemed to be advocating this new right, even then, as a property right. They analogized it to "the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks." *Id.* at 194-95.

[9] 64 N.E. 442 (N.Y. 1902). In *Roberson*, the defendant company had, without consent, sold the plaintiff's picture to another company which used it in public for advertising purposes. The court declined to forge new ground in the common law, citing the possible consequences of a "vast amount of litigation . . . bordering on the absurd." *Id.* at 443.

[10] Immediately after the *Roberson* decision, for example, the New York legislature passed a statute intended to reverse the rule in the case. *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (Consol. 1982 & Supp. 1994).

[11] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6.1[B] (1992). The majority of these states have adopted the right of publicity solely by way of common law. *Id.*

state,[12] in recognizing the right of publicity. However, like most other jurisdictions, the first actual recognition of the right of publicity by the legislature was not explicit; rather, it came under the privacy rubric. Even after California Civil Code section 3344 was enacted in 1972, the right of publicity continued to develop at common law. Finally, in 1984 the California legislature enacted a second statute, Civil Code section 990, which extended the right of publicity beyond the death of the individual.

A. *Civil Code Section 3344 Was Never Intended to Codify a Right of Publicity*

In 1972 the California legislature enacted a statute, Civil Code section 3344, aimed at protecting individuals from the unpermitted use of their persona. The intent of the California legislature, both at the time the bill was first introduced in the General Assembly and later passed into law, was primarily to expand the scope of privacy rights[13] to include a remedy for commercial appropriation, Prosser's fourth "tort of privacy."[14] The language of the statute, although clearly broad enough to include commercial or economic injury indicative of the right of publicity, also emphasizes more subjective,

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[12] While New York was the first state to enact a privacy statute providing a remedy for commercial appropriation of a "name, portrait or picture," N.Y. CIV. RIGHTS LAW §§ 50-51 (Consol. 1982 & Supp. 1994), it has since refused to acknowledge any separate "publicity" rights that do not fit within the privacy statutes. *See, e.g.*, Pirone v. MacMillan, Inc., 894 F.2d 579 (2d Cir. 1990); Stephano v. News Group Publications, Inc., 474 N.E. 2d 580 (N.Y. 1984).

[13] The General Assembly bill, Chapter 1595, is prefaced, "An act to add Section 3344 to the Civil Code, relating to invasion of privacy." *See* 1971 Cal. Stat. 3426 (1971).

[14] In his famous 1960 article, Prosser delineated "four torts" of privacy he described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name and likeness.

Prosser continued, "It should be obvious that these four types of invasion may be subject, in some respects at least, to different rules . . . ." William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

personal types of injury. The legislative history of section 3344 indicates that the statute was indeed primarily based on a true privacy rationale,[15] and it is not clear whether the California legislators anticipated contributing to the development of a separate property right protecting purely economic interests.[16]

Certainly, the legislature gave no indication that section 3344 was intended to codify a right of publicity, or that it would supplant any evolution of a separate right of publicity at common law. Section 3344 was specifically labeled a "privacy" statute and subsection 3344(g) explicitly states that the rights granted under section 3344 are not exclusive.[17] This point is consistent with the view taken by commentators at the time the statute was passed that section 3344 would not overturn any prior case law.[18] This same view has also been consistently followed by California judges since section 3344 was enacted.[19]

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[15] The legislative history of § 3344 is actually quite interesting. Apparently California Assemblyman John Vasconcellos received a complaint from one of his constituents about form letters advertising subscriptions to *Reader's Digest* magazine. The letters listed the names and addresses of the recipient and his/her neighbors, and indicated that they had all been selected to participate in a sweepstakes contest. The constituent complained to Vasconcellos that his name was being used to help sell subscriptions to the magazine without his consent. MCCARTHY, *supra* note 11, § 6.4[E][1]. *See also* Stilson v. Reader's Digest Ass'n, Inc., 28 Cal. App. 3d 270, 104 Cal. Rptr. 581 (1972) (holding that a recipient of one of the *Reader's Digest* solicitations could not maintain an invasion of privacy class action lawsuit), *cert. denied* 411 U.S. 952 (1973).

[16] In the dissenting opinion in Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P. 2d 425 (1979), Chief Justice Bird noted that "[t]he legislative history of Section 3344 strongly suggests that the Legislature was concerned with an individual's right to privacy, not an individual's proprietary interest in his or her name and likeness." *Id.* at 842 n. 23 (Bird, C.J., dissenting).

[17] "The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law." CAL. CIV. CODE § 3344(g) (West Supp. 1994).

[18] *See* Robert B. Miller, Comment, *Commercial Appropriation of an Individual's Name, Photograph or Likeness*, 3 PAC. L.J. 651, 660 (1972) ("[T]hat section 3344 was not intended to overturn prior case law can be seen in the concluding subsection of the new statute.").

[19] *See, e.g.*, Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 537; 18 Cal. Rptr. 2d 790, 791 (1993) ("[A]ppellant's action relies on alternative theories, one for appropriation under the Civil Code, the other . . . under the common law."); Eastwood v. Superior Court, 149 Cal. App. 3d 409, 416; 198 Cal. Rptr. 342, 346 (1983) (stating that "[common law] appropriation 'has been *complemented* legislatively by Civil Code section 3344.'") (quoting Lugosi v. Universal Pictures, 25 Cal. 3d 813, 819 n.6, 603 P.2d 425, 428 n.6 (1979).

Section 3344 protects five specific aspects of an individual's persona: name, voice, signature, photograph, and likeness.[20] The significance of the five categories of persona is simply that the right is so limited—limited to uses that evidence a direct connection to the individual, rather than something that arguably evokes an image, thought, or reminder of the individual's identity.[21]

Section 3344 defines an infringing use (*i.e.*, commercial use) of the plaintiff's persona by prohibiting use "in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of [the same]."[22] Thus, there must be a connection between the use of persona and an attempt by the user to benefit from that use. This is the essence of a finding that there was a "commercial purpose." Furthermore, it is also clear that a merely incidental use of an individual's persona will not constitute appropriation for a commercial purpose.[23]

While it is clear that plaintiffs operating under section 3344 must show that their persona is being used for a commercial purpose, the statute also contains several general exemptions for certain types and manners of use for which consent is not required and liability will not be found. The exemptions are found in subsection (d), which states that any use "in connection with any news, public affairs, or sports broadcast or account, or any political campaign" is exempted.[24] This section finds its basis in generally addressing First Amendment free speech concerns,[25] however, the broad language has not always been applied consistently by the courts, and the exemptions have been used

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[20] CAL. CIV. CODE § 3344(a) (West Supp. 1994). Protection of voice and signature was added to the statute in a 1984 amendment, at the same time the newer § 990 statute was enacted. Both § 3344 and § 990 protect the same five indicia or aspects of an individual's persona.

[21] As will be seen in part II(B), other more indirect indicia of the persona of an individual are allowed protection under the common law right of publicity.

[22] CAL. CIV. CODE § 3344(a) (West Supp. 1994).

[23] *See* Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880; 118 Cal. Rptr. 370 (1974) (holding that the use of a plaintiff's name and experience of finding and returning a large sum of money as the basis for a lesson in a college English textbook was not a prohibited use under § 3344).

[24] CAL CIV. CODE § 3344(d) (West Supp. 1994).

[25] *See generally* U.S. CONST. amend. I.

as an effective weapon by defendants in section 3344 claims to escape liability.[26]

The immediately following subsection sets up a framework for the burden of proof a plaintiff must meet in showing commercial appropriation. Subsection (e) states that where a use occurs within material in a commercial medium or material that contains paid advertising, the plaintiff must show that the use was "directly connected with the commercial sponsorship or with the paid advertising."[27] This subsection is arguably redundant,[28] and has proved to be of crucial significance in practice, other than possibly to give courts more of a justification for construing the right narrowly.

In applying section 3344, courts have gone beyond simply looking for "commercial sponsorship"; rather, using the categories of exemptions as a baseline, the courts have created a new, more difficult standard of liability. In two of the most recent cases applying section 3344, courts refused to consider the issue of commercial appropriation unless the plaintiff first disproved the applicability of the "news" and "public affairs" exemptions. In *New Kids on the Block v. News America Publishing, Inc.*, the court held that in order to prove liability, the plaintiffs had to show that the defendant's use of their identities as popular music stars in conjunction with a "900 number" newspaper advertisement was "wholly unrelated to news gathering and reporting."[29] Since the plaintiffs could not meet this burden, the court refused to address any issue of commercial appropriation, and the cause of action under section 3344 failed.[30] The court's basis for finding "newsworthiness" was simply the fact that the defendant intended to later publish an article indicating the calls it had received due to the advertisement.[31] Indeed, the court distinguished its

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[26] *See* discussion *infra* part IV(C).

[27] CAL. CIV. CODE § 3344(e) (West Supp. 1994).

[28] The redundancy exists because plaintiffs already must prove, under subsection (a), that their personas were used "for purposes of advertising or selling, or soliciting purchases." This language seems to clearly mandate a mutual connection between the persona and the ultimate commercial sponsorship.

[29] 745 F. Supp. 1540, 1546 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir. 1992).

[30] *Id.*

[31] *Id.*

holding along a very thin line, adding that "if the defendants provided 900 number services that had no relation to any proposed article . . . , plaintiffs could sustain their burden of showing that [the] use . . . constituted commercial exploitation."[32]

In a more recent case, *Dora v. Frontline Video, Inc.*,[33] a California Court of Appeals held that a video documentary about surfing, chronicling events and personalities at Malibu in the 1950's, fell within the exemption for "public affairs" and therefore did not constitute a commercial use of persona. The plaintiff, surfer Mickey Dora, was featured in a documentary entitled "The Legends of Malibu." The documentary included both audio and video images of the plaintiff surfing and being interviewed on-camera.[34] Without considering the possible commercial motive for the production or the value of the appropriation of the plaintiff's persona, the court found that the general subject matter of the documentary was within the purview of "public affairs," and thus the use of plaintiff's persona was exempted under subsection 3344(d).[35] The court adopted a loose definition of the "public affairs" exemption, based in part on the court's presumption that it was intended to be a broad provision.[36]

The end result of the judicial interpretation of section 3344 is that a plaintiff will often have a very difficult time proving that the use at issue does not fall into one of the broad categories of exemption such as "news" or "public affairs." If such a showing cannot be made, a court operating under section 3344 will likely refuse to address any argument of commercial appropriation of the plaintiff's persona, and

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[32] *Id.* at 1547.

[33] 15 Cal. App. 4th 536, 18 Cal. Rptr. 2d 790 (1993).

[34] *Id.* at 540.

[35] The court elaborated:

> [S]urfing is of more than passing interest to some. It . . . influences speech, behavior, dress, and entertainment . . . . [It] has an economic impact, because it affects purchases, travel, and the housing market. . . . [It] touches many people. It would be difficult to conclude that a surfing documentary does not fall within the category of public affairs.

Id. at 546.

[36] "We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. . . . We also presume that the term 'public affairs' was intended to mean something less important than news." *Id.* at 545.

the cause of action will fail.

B. *The California Courts Have Adopted a More Flexible Approach That Allows for a Broader Right of Publicity at Common Law*

One of the things the enactment of section 3344 did not do was halt the development of a broader right of publicity at common law. Prior to 1972, California courts had recognized rights analogous to a right of publicity, but had not labeled them as such.[37] The courts talked about the idea of a right of publicity in terms of a specific property right, emphasizing the economic interests in need of protection—interests not explicitly protected in the 1972 statute.[38] Two decisions after 1972 implicitly recognized a common law right of publicity,[39] and in 1983 a California Court of Appeals in *Eastwood v. Superior Court* explicitly stated that a right of publicity exists at common law and may be pleaded in addition to the statutory cause of action.[40] This development seems consistent with the accommodating approach to the right of publicity taken by the California legislature in

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[37] *See, e.g.*, West v. Lind, 186 Cal. App. 2d 563, 9 Cal. Rptr. 288 (1960) (finding that the defendant had not attempted to imitate Mae West's "persona" in the role of "Diamond Lil"); Chaplin v. Amador, 93 Cal. App. 358 (1928) (enjoining an actor named "Charles Aplin" from appearing in a movie imitating the appearance, costumes, and mannerisms of the "Little Tramp" character made famous by Charlie Chaplin).

[38] "[T]here is no mention in the legislative documents [of § 3344] of the right of publicity or the economic interest protected thereunder." Lugosi v. Universal Pictures, 25 Cal. 3d 813, 842, 603 P.2d 425, 443 n.23 (1979).

[39] *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825 (9th Cir. 1974) ("[W]e conclude that the California appellate courts would . . . afford legal protection to an individual's proprietary interest in his own identity."); *Lugosi*, 25 Cal. 3d at 824; 603 P.2d at 431 ("The so-called right of publicity . . . endows . . . the person . . . with commercially exploitable opportunities.").

[40] 149 Cal. App. 3d 409, 416, 198 Cal. Rptr. 342, 346 (1983). *See supra* note 19 and accompanying text. Later decisions have affirmed as a matter-of-fact this dichotomy in the law. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("The statute, however, does not preclude . . . [a] cause of action . . . at common law; the statute itself implies that such common law causes of action do exist because it says its remedies are merely 'cumulative.'"), *cert. denied sub nom.*, Young & Rubicam, Inc. v. Midler, 112 S. Ct. 1513 (1992).

subsection 3344(g);[41] however, the legislature has not explicitly spoken on whether it approves of the courts' development of a separate and distinct right of publicity at common law.

Thus, since the legislature has made no attempt to overturn case law, today the right of publicity is alive and well in the common law of California. The common law cause of action has been a welcome alternative to plaintiffs seeking to assert their rights of publicity. Although courts were initially very reluctant to explicitly recognize the right of publicity without a clear mandate from the legislature,[42] over the past ten years some of the largest right of publicity damage awards have been given under the common law.[43]

The unique characteristics of the common law right of publicity are broader categories of protectable aspects of an individual's persona and a lack of specifically exempted uses of persona. The common law cause of action has been successfully invoked to protect aspects of an individual's identity beyond those listed in the statutes.[44] For example, in the *Waits* and *Midler* cases, the plaintiffs recovered for commercial appropriation of their voice through "sound-alikes."[45] More recently, the court in *White v. Samsung Electronics America, Inc.* allowed the plaintiff, Vanna White, to maintain a cause of action for indirect appropriation of her "identity" in the defendant's advertisement.[46] The *White* court also explicitly refuted the statutory approach to limited aspects of persona, stating, "The right of publicity does not require that appropriations of identity be accomplished

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[41] *See supra* note 17 and accompanying text.

[42] One federal judge stated, "This court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity." Strickler v. National Broadcasting Co., 167 F. Supp. 68, 70 (S.D. Cal. 1958).

[43] *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (affirming a jury verdict and award of $2.5 million in compensatory damages, punitive damages, and attorney's fees, in favor of singer Tom Waits).

[44] *See supra* note 18-19 and accompanying text.

[45] *See Waits*, 978 F.2d 1093; *Midler*, 849 F.2d 460.

[46] Indeed, the plaintiff was forced to rely on the common law right—the court found that her statutory cause of action under § 3344 failed because the robot-caricature used in the ad did not qualify as a "likeness" under § 3344(a). White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

through particular means to be actionable."[47] This rejection of an exclusive list of actionable aspects of persona is a major reason why the common law right of publicity is viewed as a broader cause of action than the right of publicity under section 3344. Thus, a plaintiff seeking to recover under section 3344 will usually plead the common law right of publicity in the alternative.

Courts have also eschewed *per se* exemptions for specific types or manners of appropriation, allowing a more balanced approach for determining when there should be liability. In *White*, the most recent case decided under the common law, the Ninth Circuit Court of Appeals inquired into the "primary message" of an advertisement that used Vanna White's celebrity image as a "spoof."[48] The advertisement for defendant's video cassette recorders (VCRs) depicted a robot-model caricature of the plaintiff turning letters as she does on the popular television game show "Wheel of Fortune." The court conceded that the advertisement clearly intended to parody the plaintiff; however, because the court also found that the defendant's "primary message" was to advertise VCRs, not poke fun at Vanna White, the defendant's "parody" defense did not carry sufficient weight to avoid liability.[49] In rejecting the defendant's asserted First Amendment "parody" defense, the court reiterated, "This case involves a true advertisement run for the purpose of selling Samsung VCRs. The ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: 'buy Samsung VCRs.'"[50]

The balanced approach of the *White* court is quite different from

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[47] *Id.* at 1398. The court later added:

> [Prior cases] teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity. A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.

Id.

[48] *Id.*

[49] The Circuit Court of Appeals only ruled that the plaintiff had stated a cause of action under the common law right of publicity—thereby reversing the summary judgment issued by the district court in favor of the defendant Samsung. *Id.*

[50] *Id.* at 1401.

the statutory scheme set forth in the two sections of the California Civil Code. In fact, the differences between the doctrines create two completely different standards for the court's inquiry. Because the statutes contain *per se* exemptions from liability, the court must determine whether an exemption applies before considering whether there has been commercial appropriation of the plaintiff's persona. If an exemption applies, the court's inquiry is finished and the plaintiff will lose, without ever getting a chance to show that his or her persona has been appropriated, at least in part, for a commercial purpose.

There are no explicit *per se* exemptions incorporated into the common law doctrine. Thus, the court is not required to undertake an initial "exemption" inquiry before addressing the issue of commercial appropriation. Instead, courts have first inquired into the nature and extent of the commercial appropriation, and then turned to the question of whether the defendant's use of persona can be legitimately characterized as non-commercial to the extent that it should be protected from liability. Thus, it appears that California courts considering the common law right of publicity are willing to look with a keener eye toward finding appropriation for commercial purposes by balancing the asserted property interest of the individual with the purported non-commercial use claimed worthy of protection from liability.

C. *The Addition of Civil Code Section 990 Grants Only a Very Limited Post-Mortem Right of Publicity*

The final piece in the right of publicity puzzle was added in 1984 when the California legislature enacted Civil Code section 990, granting a statutory right of publicity cause of action for the appropriation of the persona of deceased personalities.[51] The legislature was spurred to act by the California Supreme Court's

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[51] Section 990 protects the same five aspects of persona included in § 3344; therefore, § 990 is only an extension of the *statutory* right of publicity past the death of the individual. The common law right of publicity, which protects broader aspects of persona, is still not descendible.

refusal to extend the common law right of publicity beyond death in *Lugosi v. Universal Pictures*.[52] And, since section 3344 was grounded in a privacy rationale, dealing only with commercial injury to "another,"[53] the legislature decided that a new law was needed to extend the right of publicity beyond death.

The legislature initially attempted simply to amend section 3344 to accommodate the extension of the right of publicity to deceased personalities.[54] Actually, the bill to amend section 3344 sat in the California Senate and General Assembly for almost a year before the legislature decided against amendment and in favor of enacting an entirely new statute.[55]

As mentioned above, the genesis of California's post-mortem right of publicity, Civil Code section 990, was the California Supreme Court's decision in *Lugosi*. The *Lugosi* court held that the right of publicity, whether asserted under Civil Code section 3344 or the common law, was not descendible and terminated on the death of the individual.[56] The heirs of Bela Lugosi had sought to recover profits related to Universal's licensing of the rights to use the Count Dracula character, made famous in part through the 1930 film *Dracula*, in which Bela Lugosi played the title role. In reaching its decision, the court emphasized that the "so-called" right of publicity was fully and adequately addressed in the law of privacy, and that the right continued to be primarily a personal rather than a property right.[57]

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[52] 25 Cal. 3d 813, 823, 603 P.2d 425, 431 (1979).

[53] The title to section 3344(a) reads: "Use of *another's* name, voice, signature, photograph, or likeness for advertising or selling or soliciting purposes." CAL. CIV. CODE § 3344 (West Supp. 1994) (emphasis added). Thus it is clear that a plaintiff under § 3344 must be a living person, *i.e.*, "another."

[54] *See* CALIFORNIA ASSEMBLY JOURNAL, at 7785 (Aug. 15, 1983).

[55] *See id.* at 14,804 (May 14, 1984).

[56] Lugosi v. Universal Pictures, 25 Cal. 3d 813, 824, 603 P.2d 425, 431 (1979) ("We hold that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime.").

[57] *Id.* at 823-24. The court stated that "[i]t is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded. Further, the right . . . dies with the person." *Id.* (citations omitted). The court also cited policy considerations for holding against survivable rights, stating that "[i]f rights . . . survive[d] . . . death, neither society's interest in the free dissemination of ideas nor the

Chief Justice Bird's dissent in *Lugosi* paved the way for the California legislature to overrule the court's decision. The Chief Justice first attacked the court's reluctance to venture outside the law of privacy. Since the interests sought to be protected by Lugosi's heirs were not personal but purely economic, the dissent reasoned, the privacy rationale was inadequate. Rather, the user is "reaping one of the benefits of the celebrity's investment in himself,"[58] and is therefore misappropriating his economic property. Addressing the descendibility issue, Chief Justice Bird again emphasized that what is at stake is a proprietary interest, not a personal one. In light of this distinction, the dissent could find no good reason why the right of publicity "should not descend at death like any other intangible property right."[59]

The first recognizable feature of section 990 is that it explicitly identifies the rights protected as property rights. While the language used in section 990 is otherwise largely identical to that in section 3344, the former states that "the rights recognized under this section are property rights, freely transferable."[60]

The same five aspects of persona are protected under section 990—name, voice, signature, photograph, and likeness. The nature of an infringing use, that is, a commercial use of persona, is also defined the same way as in section 3344.[61] Section 990 contains provisions for determining who among the heirs of an individual may maintain a right of publicity after his or her death, and requires that any licensee or successor register a claim to the rights prior to the unauthorized use.[62] The statute also establishes that the right of publicity expires fifty years after the death of the individual.[63]

The main "facial" difference between the two statutes is the

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artist's rights to the fruits of his own labor would be served." *Id.* at 824.

[58] *Id.* at 834 (Bird, C.J., dissenting).

[59] *Id.* at 844 (quoting Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279, 284 (S.D.N.Y. 1977)) (Bird, C.J., dissenting).

[60] CAL. CIV. CODE § 990(b) (West Supp. 1994). Section 990 is also placed in a separate section of the Civil Code under the heading "Personal Property."

[61] *See supra* part II(A).

[62] CAL. CIV. CODE § 990(d)-(f) (West Supp. 1994).

[63] *Id.* § 990(g).

broader scope of exemptions included in section 990. Both statutes exempt uses of persona "in connection with any news, public affairs, or sports broadcast or account, or any political campaign." However, subsection 990(n) goes considerably further by exempting certain types of uses of persona,[64] including uses in a "play, book, magazine, newspaper, musical composition, film, radio or television program."[65] According to one commentator, the subsection 990(n) exemptions are "so broad and all-inclusive that it is difficult to conceive of forms of communication that are not included."[66]

In the only case yet decided under section 990, *Joplin Enterprises v. Allen*,[67] a federal district court in Washington held that a play about deceased rock musician Janis Joplin fell plainly within the subsection 990(n) exemptions. Thus, the court found that any assertion by the plaintiffs of commercial appropriation under section 990 was barred. The plaintiffs, Joplin's heirs, argued that Act II of the play, which re-created a concert performance by Joplin, constituted commercial appropriation and should be considered separately from the rest of the play. The court rejected this proposed analysis and instead found that the play must be considered in its entirety, stating that "section 990 clearly contemplates examining the use of a deceased personality's name, voice, etc., in terms of the total context in which it appears. . . . To analyze Act II of *Janis* out of context would destroy the statutory exemption."[68]

Since section 990 was originally slated to become part of the section 3344 statute, the fact that a third right of publicity has emerged cannot really be called "accidental." However, the fact that section 990 was not an accident does not mean it was well-conceived by the California legislature. The technical differences between the two

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[64] *See id.* § 990(n).

[65] *Id.* § 990(n)(1).

[66] MCCARTHY, *supra* note 11, § 6.4 [F][3][b]. McCarthy postulates that while there is no clear legislative history on point, it seems obvious that in including the additional exemptions, the California legislature had decided that the post-mortem right of publicity must be more sensitive to First Amendment concerns than § 3344, the living-person's statute. *Id.* § 6.4[F][4].

[67] 795 F. Supp. 349 (W.D. Wash. 1992).

[68] *Id.* at 351.

statutes are confusing, and the lack of a compelling justification for those differences suggests that the incongruous result of having three different rights of publicity was not adequately considered by the legislature.

III. THE POLICIES AND JUSTIFICATIONS FOR THE RIGHT OF PUBLICITY ALSO SUPPORT A UNIFIED RIGHT PROMOTING IDENTICAL CONCERNS

There have been several policy arguments consistently set forth by both courts and commentators in favor of the right of publicity—namely, moral, economic, distributional, and consumer protection justifications for recognizing the right. There has also been some substantial and recent criticism of these traditional arguments.[69] It seems, however, that the right of publicity is on solid philosophical ground, notwithstanding the fact that California lawmakers have taken three different approaches to recognizing and protecting the right.

To be sure, it is not the purpose of this Comment to rejustify the right of publicity to all would-be doubters. Instead, by presenting the traditional and some non-traditional justifications for the right of publicity, this Comment hopes to show that the three separate rights of publicity in California are not adequately supported on policy grounds. Therefore, the right of publicity can and should be dealt with, both philosophically and doctrinally, as one right instead of three.

The two most popular justifications for the right of publicity are based on moral and economic arguments. The moral justification is that the right of publicity is needed to prevent unjust enrichment of a commercial user of persona at the expense of the individual whose persona is commercially appropriated. In other words, the individual should be rewarded for the "fruits of his labor." On the economic

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[69] *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 132 (1993) ("I hope . . . to reopen the question of whether the right of publicity should exist at all . . . ."); *see also infra* note 84 and accompanying text.

side, proponents argue that the recognition of the right of publicity provides an incentive for individuals to develop valuable personas, which will ultimately benefit society.

There are other reasonable justifications for the right of publicity that will also be useful in suggesting appropriate doctrinal reform. First, there is a separate economic argument that giving a right to the individual rather than the user of a persona will result in a more efficient allocation of resources, and lower "transaction" costs. Second, fairness or "distributional" considerations, while not particularly favoring either the individual or the user of the persona, do not oppose the idea of forcing the commercial user to pay for a use of persona. Lastly, connected to the distributional argument is the notion that the commercial use of persona, particularly within the context of celebrity advertising, provides a disincentive for rational consumer choices. Therefore, whether a consumer heeds the disincentive or simply places no value on the commercial use of persona, forcing the commercial user to pay for its use seems, at worst, not unfair.

A. *The Moral Justification Concludes That a Commercially Valuable "Persona" Is Property Owned by the Individual*

The basic moral argument for recognizing the right of publicity starts with the notion that a commercially valuable persona only emerges through some labor and effort by the individual. The individual's efforts, if successful, create an intangible piece of property or a "product," characterized by consumer recognition and goodwill. This intangible product has value because it is desired by those who can use it to attract consumer attention and sell goods or services. Therefore, the individual has a natural right "to enjoy the fruits of his own industry" and control how the commercially valuable persona will be exploited, since he or she originally created the persona through his or her own efforts.[70]

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[70] *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 839, 603 P.2d 425, 441 (1979).

This kind of moral justification was widely used by courts initially seeking to recognize the right of publicity. Most courts explicitly stated that they were trying to prevent "unjust enrichment" of those who would make an unauthorized appropriation of the value of an individual's persona for their own commercial advantage. When this is done, the courts reasoned, the user is "usurp[ing] both profit and control of that individual's public image."[71]

The primary value of the moral justification for suggesting reform is the idea that the law should provide a framework that is adequate to identify situations in which this type of unjust enrichment occurs. Since this idea—that the user's activities must not constitute commercial appropriation of an inherently valuable persona—is a backbone of the right of publicity, the conduct of the user should at least be addressed in every situation. This type of analysis is currently being compromised, and sometimes even foreclosed, under the two California statutes, which allow liberal application of the "exemptions" from liability and often limit judicial inquiry into the extent of commercial appropriation.

B. *Protection of the Right of Publicity Provides the Individual with an Economic Incentive to Cultivate a Valuable Persona*

Once celebrities reach a certain level of success and their persona becomes commercially valuable, the right of publicity ensures that celebrities and their heirs will be able to exploit that value. Thus, in hindsight, individuals seeking to become celebrities have an extra incentive to work hard so that they can capitalize on their right of publicity.[72] This is the essence of the economic "incentive" justification for the right of publicity.

The incentive justification is conceptually appealing, but it also has substantive weaknesses. Conceptually, it is desirable for individuals

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[71] *Id.*

[72] As the Supreme Court stated in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), the right of publicity assures that the individual will be able "to reap the reward of his endeavors." *Id.* at 573.

to work hard with the purpose of developing a "public" persona that will not only be commercially valuable but will also possess cultural value, which benefits society in general. By focusing on incentives, however, the argument really applies only to individuals who know that this is what they are doing—individuals who intend to create and capitalize on their anticipated publicity value. Average citizens who are thrust into the public light by happenstance may never have planned to exploit their persona; therefore, giving the average citizen a right of publicity will not provide an incentive to act in any particular manner.

The California Supreme Court in *Lugosi v. Universal Pictures* used a similar point in refusing to extend the right of publicity to the heirs of deceased celebrities who had not exploited their rights while they were alive. The court reasoned that since the celebrity never realized that he or she had a commercially valuable persona during his or her lifetime, a right of publicity could not possibly have served as an incentive to become a celebrity.[73] Therefore, the court concluded, the right of publicity did not extend beyond the death of the individual.[74]

The first response to the inherent weakness of the incentive justification, in the context of the post-mortem right, is that the right of publicity is not solely grounded on incentives. Second, the incentives analysis fails to address both sides of the coin. Part of the reason that the incentive justification is misleading comes from the fact that it focuses only on the conduct of the individual claiming a right of publicity, ignoring that of the commercial user of persona. The fact that celebrities have no opportunity to exploit their persona during life may have nothing to do with any conscious choice, or knowledge that they possessed a right. In other words, individuals usually cannot simply decide one day to begin exploiting their right of publicity; more likely, people will not know they possess a right until someone else—the commercial user—tells them that their persona is commercially valuable. And, it is not inconceivable that an individual's persona will not be desirable to potential commercial users

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[73] Lugosi v. Universal Pictures, 25 Cal. 3d 813, 821, 603 P.2d 425, 430 (1979).

[74] *Id.*

until after the celebrity is deceased.[75] So, it seems unreasonable not to allow the heirs of a celebrity to exploit the celebrity's valuable persona simply because the celebrity did not live long enough to witness the actual realization of commercial value.

The incentive justification may have been more useful when courts only thought of the right of publicity as a personal right within the privacy framework. Now that the right of publicity has been distinguished from the law of privacy and is recognized as a property right, policy considerations should focus less on whether individuals personally appreciate their right of publicity as an incentive, and more on whether the commercial user has objectively misappropriated a persona that has value.

C. *The Efficient Allocation of Economic Resources Supports Giving the Right of Publicity to the Individual to Control the Use of Persona*

The law has recognized that the right of publicity exists in the individual rather than the user of persona; that is, the individual may assert the right and either stop an unauthorized use or force the user to pay damages for it. Placing the right of publicity in the individual is partly justified by asserting that it will result in the most economically efficient allocation of resources.

Commentators have reasoned that economic efficiency considerations, such as the costs of conducting transactions, will often dictate which party should receive a right, or "entitlement," from society.[76] Placing the costs of conducting transactions on the party who can most cheaply avoid those costs, while giving the right to the other party, allows the former party to buy out the entitlement, but with the least overall transaction costs.[77] Transaction costs are

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[75] Indeed, for some late-blooming celebrities, such as James Dean, the persona becomes significantly more commercially valuable once they have died.

[76] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972).

[77] *Id.* at 1096-97 ("In the absence of certainty as to who [should have the entitlement], the costs should be put on the party . . . [who] can with the lowest transaction costs act in the market to correct an error in entitlements.").

important because they are never beneficial to anyone, whether to the parties themselves or to society as a whole. Therefore, avoidance of transaction costs provides a benefit to society.

If the entitlement is given to the commercial user of persona, it is unlikely that the individual will be able to force a transaction to buy out the entitlement. First, the individual probably will not know of a commercial use until it is made public, and the individual sees or hears about the use. In many cases this will be too late, because the aim of the individual to halt the use before it occurs will have been frustrated and the individual may have already incurred wasteful transaction costs.

Second, if we force the individuals to pay users not to use their persona, the individuals will face a "holdup" problem. The holdup problem is equivalent to extortion by the potential commercial user, who has an incentive to make the individual believe that unless paid off, the user will commercially appropriate the individual's persona. The individual will then be forced to pay off any and all potential users who make similar claims, never knowing for certain whether such claims are legitimate. The holdup problem could potentially result in large transaction costs for both parties, and a general wasting of economic resources.

The commercial user of persona, on the other hand, is usually well-positioned to conduct an efficient transaction to "buy out" the right of publicity from the individual. The user most likely knows whose persona is being appropriated, and the user also has a good idea of the commercial value generated by that use, and therefore how much the user would be willing to pay to buy out the right of publicity from the individual. Consequently, a transaction for the transfer of the right only involves locating the individual and reaching an agreement, such as a license to use a celebrity's persona.

D. *Distributional Goals Favor Rewarding the Creators of Commercially Valuable Personas over Commercial Users*

When making a choice between individuals having the right to be compensated for the commercial use of their persona, or users having

the right to use that persona without cost, the issue of whether one party should be made richer at the expense of the other must be considered. These kinds of considerations have been termed "distributional goals."[78] What distributional goals measure are the relative merits of opposing schemes of rights, in order to choose an initial entitlement consistent with a general wealth distribution scheme favored by society.[79]

Neither the celebrity nor the commercial user of persona seems particularly deserving of increased wealth. Most celebrities who are sought after for advertisements or endorsements already make a great deal of money at the career that made them famous. Most of the public is not sympathetic to the notion that with a strong right of publicity, celebrities could be making even more money. The commercial user of persona is usually also making a substantial profit, probably much more money than would have to be paid for a particular use of persona, so it does not seem inappropriate to require the user to pay for a license and acknowledge that some commercial value is being drawn from the persona.

The celebrity may be favored for increased wealth over the commercial user based on a creativity rationale. This idea simply suggests that since the individual has actively created a persona that society desires—that is, one that provides a benefit to society—the individual has done something good and should be rewarded for it. The individual's reward is the grant of a property right to be compensated for the commercial use of his or her persona.

While distributional considerations do not strongly favor giving the right of publicity to either the individual celebrity or the user of persona, the user's unique ability to spread costs, in most cases, suggests that the user will be harmed less by not having the right. The user can spread costs not only by passing them along to consumers, but also by "absorbing" costs, because the user will usually be a relatively large organization whose specific costs do not

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[78] *Id.* at 1098.

[79] *Id.* at 1099 ("Which entitlement a society decides to sell, and which it decides to give away, will likely depend in part on which determination promotes the wealth distribution that society favors.").

affect people individually.

The individual holder of the right of publicity, on the other hand, does not have a similar ability to spread costs. Therefore, it seems more fair to allow the cost of acquiring the right to fall on many rather than on one individual. This idea is consistent with current right of publicity doctrine, which gives its entitlement to the individual.

E. *Having a Right of Publicity in the Individual Discourages Irrational Consumer Choices*

In most cases where a commercial use of persona should give rise to liability, such use provides questionable benefits to society. Uses of persona in the context of advertising or on commercial products, or where there is primarily a commercial message, are usually aimed at discouraging rational consumer choices.[80] The product or service being advertised, the user hopes, becomes more valuable due to the value of the familiar persona associated with it. This "value added" usually has nothing to do with the product or service itself, but nevertheless makes the item more desirable to the consumer.[81]

Theoretically, forcing commercial users to buy out an individual's

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[80] It is true that some advertising, including celebrity endorsements, is relevant to rational consumer choices. The level of advertising can provide the consumer with information regarding the solvency of the advertiser or the general quality of its products, based on the inference that "the more a brand advertises the more likely it is to be a better buy." Phillip Nelson, *The Economic Value of Advertising, in* ADVERTISING AND SOCIETY 50 (1974). However, this rationality has nothing to do with the use of a familiar persona in the ad; the celebrity, who may not and usually does not know anything about the relative quality of a particular product, does not add anything to that rationality. Instead, the inference from the use of the celebrity to the quality of the product, besides the notion that the user has spent a great deal of money for the celebrity's endorsement, is still irrational.

[81] A recent consumer survey disputes the idea that consumers actually place significant value on celebrity endorsements. *See* Horovitz, *supra* note 2, at D7. This proposition—that consumers do not in fact rely on endorsements—does not hamper the argument that consumer reliance is irrational; in fact, for the purposes of the present argument it has the same effect as the notion that consumer reliance is irrational. Either way, there is no good reason to encourage endorsements by giving an entitlement to the commercial user for free use of persona.

right of publicity would not impose a cost on the consumer, because a rational consumer places little or no value on the commercial use of persona.[82] Rational consumers do not think a Ford is a better car because they hear Bette Midler's voice in the background of a television commercial; they do not crave Doritos tortilla chips because Tom Waits sings about them. Rather, rational consumers compare the tangible benefits they will receive from a product with its cost, and decide if the former outweigh the latter.[83]

The marketing professional will quickly dismiss this argument, because everyone knows that there is no such thing as a completely rational consumer in our society. A testament to this is the fact that our culture is, now more than ever, saturated with celebrity images and endorsements. But does this explain why we should not impose costs on commercial users of persona—costs that are eventually borne by the public, but which encourage irrational consumer choices? It seems that the answer to this question should be "no," assuming that as a society we want to encourage rational consumer choices. A desire to encourage rational consumer choices, then, supports a strong right of publicity, or at least is not inconsistent with the right being vested in the individual rather than the commercial user of persona.

F. *Challenges to the Justifications for the Right of Publicity Should Be Considered on a Philosophical Level*

Recent commentary has challenged the philosophical basis of the right of publicity. In his January 1993 article, for example, Professor Michael Madow criticizes the standard justifications for the right of publicity, arguing in part that a celebrity persona is really owned, not

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[82] *See id.* (statistics showing that only 10% of 30,000 consumers surveyed consider celebrity endorsements an important source of information for buying sneakers).

[83] For example, generic wheat flakes cereal, which has the same ingredients and nutrition information as Wheaties brand, costs much less. The only reason I can give for buying Wheaties over the generic brand is that Michael Jordan, as well as other notable athletes, appears on the box. So, his persona must add value to the Wheaties product that makes it worth the extra cost, but I cannot explain what this added value is or why it is rational.

by the individual, but by the society that gives it cultural "meaning."[84] Madow argues that recognizing a right of publicity suppresses essential cultural discourse, especially within minority groups, and unfairly redistributes some of society's wealth upwards.[85]

As stated above, it is not the intention here to re-justify the right of publicity. What can be said about Professor Madow's concerns is that in some instances they are valid. The right of publicity should not be a tool for the suppression of cultural discourse. To some extent these concerns are dealt with, and should be left to, the protections provided by the First Amendment. However, there are certainly some situations in which although a persona is commercially used, there is also some cultural aspect of the use worthy of protection. For example, if a person makes twenty greeting cards using Sylvester Stallone's picture and a funny slogan, and then sells the cards at a yard sale, he or she should not be required to obtain permission from Mr. Stallone or surrender some of the profits. To this end, then, the law should reflect these cultural concerns by remaining adaptable to different situations, and avoid rigid application at all costs.

IV. THE PROPER FOCUS OF REFORM: ENSURING THAT THE RIGHT OF PUBLICITY REFLECTS CONSISTENT POLICY

The right of publicity in California has evolved accidentally into three different causes of action, with three quite different standards of liability. Before determining how the law should be changed, it is necessary to analyze why the current distinctions between the three rights of publicity do not make sense, and which characteristics of the three doctrines are consistent or inconsistent with the justifications and policies supporting the right of publicity.

The distinctions between the three doctrines lie in three main categories: 1) protected aspects of persona; 2) *per se* exemptions; 3)

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[84] *See* Madow, *supra* note 69.

[85] *Id.*

the depth of inquiry into assessing commercial appropriation.

A. *The Right of Publicity Should Not Be Limited to Five Specific Indicia of Persona*

The California legislature has chosen to limit the applicability of the two statutory rights of publicity to only five specific indicia or aspects of an individual's persona.[86] The courts, however, have been willing to recognize the common law right of publicity beyond those five indicia, into the realm of commercial appropriation of voice "sound-alikes"[87] and the general "identity"[88] of a celebrity. In rejecting the statutory approach, the courts have looked principally to the manner of the defendant's activities for a strong suggestion that the individual is somehow closely associated with the commercial use. The courts have not always concerned themselves with the precise aspect of the plaintiff's "identity" that has been used to create this suggestion.

The approach of the common law seems more appropriate than the statutory categories of indicia of persona, and more faithful to the justifications for the right of publicity. The individual's property interest in his or her persona is invaded no matter what aspect or feature is used to indicate that persona. Indeed, the cases decided under the common law right of publicity indicate that the value of an individual's persona may be just as readily appropriated through indirect means as through direct.[89]

The common law approach is also consistent with the policies underlying the right of publicity. The property value of an

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[86] *See supra* note 61 and accompanying text.

[87] *See supra* note 45 and accompanying text.

[88] *See supra* notes 48-50 and accompanying text; *see also* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825-26 (9th Cir. 1974) ("[W]e conclude that the California appellate courts would . . . afford legal protection to an individual's proprietary interest in his own identity.").

[89] *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("The human voice is one of the most palpable ways identity is manifested."), *cert. denied*, 112 S. Ct. 1513 (1992).

individual's persona, which the right of publicity seeks to protect, is measured by the response the commercial user generates, or hopes to generate, directly from a particular use. This response comes from the consumer's recognition of or association with the familiar personality, not just the manner in which the user chooses to appropriate the persona.

The two best examples of the unnecessary limitations of the statutory rights of publicity are the *Midler* and *Waits* cases. In those cases, the plaintiff was allowed to assert a right of publicity, even though it was not the plaintiff's actual voice that was used—rather, in both cases the defendant used a close imitation of the plaintiff's singing voice in marketing a product. The court in each case recognized that the appropriation of a "sound-alike" voice was equivalent to the use of the plaintiff's actual voice, so recovery was allowed.[90]

The voice of a famous personality does not become any less valuable because the defendant has used a singer who sounds exactly like that personality. It follows that no such distinction with respect to the right of publicity as a property right should be recognized. Therefore, the right of publicity should not be limited to five specific aspects of persona, but instead should be actionable whenever the defendant has commercially appropriated the value of the plaintiff's persona, in any manner.

B. *The Specific* Per Se *Exemptions of Subsection 990(n) Should Be Eliminated from the Doctrine*

The California legislature obviously had something in mind when it drafted subsection 990(n), which provides *per se* exemptions from liability for certain specific uses of persona.[91] Section 990 was legislated together with proposed changes to section 3344, and the two statutes are worded nearly identically. However, section 3344 emerged from the amendment process without a subsection

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[90] *See supra* notes 44-45 and accompanying text.

[91] *See supra* notes 64-68 and accompanying text.

corresponding to section 990(n), and thus, without the specific *per se* exemptions.

The justification for subsection 990(n) seems to rest on the desire to give more First Amendment freedom to one who uses the persona of a deceased personality, and therefore to limit the number of situations in which heirs or assignees may assert a right of publicity once a personality is dead.[92] There is no doubt that the First Amendment had much to do with certain exemptions—clearly, newspapers, books, political material, and other cultural media will usually enjoy unquestioned First Amendment protection. The other exemptions that were included, however, are not so clearly deserving of an exemption. Since only one of the exemptions in section 990(n) has been interpreted in case law to date,[93] it is unclear how far beyond the First Amendment the exemptions will reach to preclude liability. However, the important point is that the exemptions operate *per se*—that is, there is no inquiry allowed into the manner of the use of the individual's persona, only the form in which it is used. And, although the case law interpreting the section 990(n) exemptions is limited, the range of exemptions given seems to cover a very wide range of material.[94]

Subsection 990(n)(4) is also important, because it further exempts "[a]n advertisement or commercial announcement for a[n] [exempted] use." This exemption seems to contemplate any advertisement or commercial announcement that appropriates a persona and that is also related to a separately exempted use that appropriates the same persona.[95] However, there is no minimum level of use required in

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[92] "[The legislature] recognize[d] a post mortem Right of Publicity only in an attenuated form compared to the rights accorded living persons. . . . [They] seemingly took the position that post mortem assertions of infringement of the Right of Publicity must be more sensitive to First Amendment concerns . . . ." MCCARTHY, *supra* note 11, § 6.4[F][3][b].

[93] The *Joplin* court applied the "play" exemption to a two-act play about the late rock singer Janis Joplin. *See supra* notes 67-68 and accompanying text.

[94] For example, one can only imagine how a court might define "film" or "television program." With the line between legitimate programming and film or television used to advertise becoming more and more blurry (*e.g.* "infomercials"), courts may be forced to uphold exemptions for clearly commercial uses.

[95] An advertisement for a film or television program, for example, may incorporate the persona of an individual who also appears in the film or television program itself.

the main work that will subsequently allow the user to appropriate the persona for advertising or commercial purposes. Thus, ostensibly a filmmaker who includes a famous person as a fleeting image in a film could promote the film using the image of that same famous person.[96]

The main flaw of subsection 990(n) is that the *per se* exemptions do not allow a court to assess, or even address, the extent of commercial appropriation of persona by the user. The right of publicity finds its basis in this assessment—the right entitles the individual to the economic value of the individual's persona as it was used for another's commercial advantage. Within certain categories of use, the result of this inquiry is clear, such as where freedom of expression must clearly be protected. These categories would certainly include political or newsworthy material, since those have always been given strong First Amendment protection. In other categories, however, the manner of use is too broad to merit *per se* protection, and the exemptions offered by subsection 990(n) simply give an incentive to appropriate the persona in a manner that is protected by the statute.

On its face, section 990, as compared to section 3344, more clearly defines the right it grants.[97] The line between a use that may infringe and one that does not rests only on a court's interpretation of terms such as "play," "book," or "magazine." Even a narrow interpretation of those terms would seem to exempt a great range of material. But outside the stated categories, section 990 still relies on the same test for an exempted use that appears in section 3344—that is, whether the persona was used "in connection with any news, public affairs, or sports broadcast or account, or any political campaign."[98] Therefore, even though a use may not appear specifically in subsection 990(n) as an exemption, the user would still be able to argue that an

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[96] For example, the filmmaker could highlight the famous person's picture on a movie poster saying, "Come see this film."

[97] Ultimately, when talking about property rights, clarity is desirable. If the law is clear as to who has a right and therefore who must obtain consent to use that right, the parties will know that disputing the right is unwarranted and they should be able to transact in the market to transfer the right if necessary (*e.g.* negotiating a license). *See* discussion *supra* part III(C).

[98] *See* CAL. CIV. CODE § 3344(d) (West Supp. 1994); *cf. id.* § 990(j).

exemption applies because of a connection with news or public affairs.[99]

The fact that there are both general and specific exemptions in section 990 may appear redundant, and in some respects it clearly is. For example, the subsection 990(n)(2) exemption is for "material that is of political or newsworthy value," which seems to match the "news . . . or political campaign" exemptions under section 990(j). What the apparent redundancy appears to reflect is a belief by the California legislature that the general exemption will not always work well enough, or be applied properly by the courts, to protect certain uses of persona that the legislature deems worthy of special protection from right of publicity claims.

How the legislature formulated their "view" as to these categories is a separate question. Certainly, many of the categories included in subsection 990(n) had not previously been addressed in right of publicity cases, so it does not appear that the legislature was codifying case law. The limited legislative history indicates that the exemptions in subsection 990(n)(1) were intended to cover "biographies, or accounts from the lives of deceased persons, authorized, accurate, or fictionalized."[100] If the legislature's intent was to exempt biographical information, then it should have done so rather than exempting all uses that appear in the form of a play, book, magazine, or other exempted forms. *Manners* of use should have been exempted instead of *forms*.

To give more protection to one who appropriates the persona of a deceased personality rather than a living personality also seems inconsistent with the status of the right of publicity as a property right.[101] Whether the individual whose persona is commercially

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[99] I refer to the exemption found in § 3344(d) and § 990(j) as one for "news or public affairs," although those statutes also exempt uses "in connection with any . . . sports broadcast or account, or any political campaign."

[100] Jerome E. Weinstein, *Commercial Appropriation of Name or Likeness Revisited*, 22 BEVERLY HILLS B. ASS'N J. 192, 214 (1988).

[101] It is not clear why the California legislature decided to include § 990(n), but not add a similar provision to § 3344. Alternatively, it is not clear why the legislature believed the more general exemption for "news or public affairs" would not, by itself, grant adequate exemptions. But it is clear that the legislature decided that § 990 would grant a narrower

appropriated is alive or dead, the nature of the injury is the same, and the interest protected is the same. The interest protected is compensation for the commercial value of the persona that has been appropriated;[102] the injury is to the person or entity who happens to hold the right. The only real difference between the two situations is that the person entitled to assert the right can no longer be the individual who created the property interest, since that individual has died.

Unlike a privacy right, the right of publicity does not lose any of its meaning once the individual has died. In the privacy scheme, the injury being addressed is purely personal injury to the plaintiff's feelings and comfort. Once the individual has died, he or she can no longer suffer personal injury, and the privacy cause of action loses any meaning. The publicity right, on the other hand, is not personal—it can be asserted by anyone to whom the right has been transferred.[103] When the individual dies, the right passes to heirs, or, if previously transferred by the individual, it passes to no one but remains transferable. Subsection 990(b) makes this clear, stating that "[t]he rights recognized under this section are property rights, freely transferable."

Often, the right of publicity becomes more valuable after the individual has died. Certainly, some of the deceased celebrities used for endorsements today did not enjoy the monetary benefits of similar endorsements while they were alive. Similarly, celebrities who choose not to give endorsements during their lifetime may wish their heirs to have the benefit of licensing their persona after death. The point is simply that there is no change in the right of publicity as a property right that happens upon the death of the individual; therefore, no difference between the two statutory rights should be recognized on this ground.

In sum, the exemptions prescribed by subsection 990(n) frustrate

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right than § 3344.

[102] "The fundamental objection is not that the commercial use is offensive, but that the individual has not been compensated." Lugosi v. Universal Pictures, 25 Cal. 3d 813, 836, 603 P.2d 425, 439 (1979).

[103] Of course, if the right has not been transferred, it remains with the individual.

the goals of the right of publicity, at least when they operate *per se* to foreclose any inquiry into alleged commercial appropriation of persona by the user. Therefore, the exemptions should be abandoned, or at least made suggestive rather than mandatory, in any reformed right of publicity doctrine.

C. *The Standard of Liability Must Allow for a Balanced Inquiry into Both Commercial Appropriation of Persona and Any Asserted Non-Commercial Purpose*

Looking at the two right of publicity statutes and the case law upholding a common law right of publicity, it is clear that each different cause of action takes into account different substantive and policy elements, and balances those elements differently. These differences must be reconciled in order to allow the continued development of the right of publicity under a unified framework.

First, as we have seen, the specific exemptions in subsection 990(n) give the commercial user of persona the ability to assert that its use fits within one of the exempted use categories and to completely avoid the issue of commercial appropriation.[104] This Comment has argued that there is no justification for a different set of exemptions for living and deceased personalities, and absent any meaningful distinction between the two statutory rights, they should be merged into one cause of action with one standard of liability.[105]

Without the specific categories of exemptions, section 3344 relies on the broader "news or public affairs" exemption to outline the statutory standard of liability. As it was applied in *New Kids on the Block v. News America Publishing, Inc.*, the standard will not be met if the court finds any justification that the use is newsworthy or in the

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[104] *See* Joplin Enters. v. Allen, 795 F. Supp. 349 (W.D. Wash. 1992). The *Joplin* opinion shows how § 990 will be mechanically applied by the courts. Once the court found that the defendant's use fit within the definition of a "play," the inquiry ceased and the issue of commercial value was never reached. *See supra* notes 67-68 and accompanying text.

[105] Aside from § 990(n) and the portions of § 990 delineating how the right should descend to heirs, § 3344 and § 990 use identical language.

public interest.[106] Again, since the test is that the use must be "wholly unrelated" to news or public affairs, a successful argument that this broad standard is met will preclude a plaintiff's arguments that commercial value has been appropriated by the defendant.

The standard of liability that has developed under the common law is less structurally rigid than the statutory standards. Instead of taking the "exemption" approach, the courts have used more of a balancing test to find liability, weighing the defendant's arguments that the use is newsworthy or otherwise non-commercial against the plaintiff's assertions that his or her persona was used primarily for its commercial value.[107]

The common law test gives the plaintiff a full and fair opportunity to argue that the value of his or her persona was used for commercial purposes. This is important because the true nature of the right of publicity injury is simply whether the defendant has siphoned the commercial value of the plaintiff's persona for its own advantage, not the manner in which the defendant has done so. Often, when the manner of the defendant's use has substantial newsworthy or public merit, the commercial value argument should be easily overcome; but the former considerations should not foreclose an inquiry into whether there has been commercial appropriation in the first place.

The breadth of the common law test recognizes that the right of publicity should depend, at least in part, on the plaintiff's ability to prove commercial appropriation. Limiting the right to certain forms of use and aspects of persona is unduly constrictive.[108] This is not to say that in most cases a court will limit liability to one of the aspects of persona outlined in the statutes and exempt uses that are currently exempt under the statutes. However, immunity from liability should only be available where it is deserved.

An appropriate model for balancing exists somewhere between the

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[106] *See supra* notes 29-32 and accompanying text.

[107] *See supra* notes 48-50 and accompanying text.

[108] "It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so." White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992).

statutes and the common law. The standard used in *White*, which takes the arguments of both parties into account to find the "primary message" of the defendant's use of persona, is a fair and necessary standard. It is certainly more fair to a plaintiff than the statutory tests, which do not require any balancing of interests. And, the *White* test is not much less fair than the statutes for a defendant. The defendant's arguments that the use of persona is primarily non-commercial may be very strong, and may even be supported by First Amendment precedents. Also, in cases where persona is indirectly used, the defendant may successfully argue that the connection to the plaintiff's persona is simply too tenuous.

I would not necessarily advocate abandoning the statutory framework for the right of publicity. However, adopting a balanced inquiry and making the current statutory exemptions suggestive rather than mandatory would allow courts to better address possible merit in the plaintiff's arguments, making sure that an unauthorized commercial appropriation of persona by the defendant does not slip through the cracks simply because it is or is not manifested in a certain form.

V. CONCLUSION

The right of publicity probably seems like a progressive idea to some. Indeed, it is a relatively recent legal development that is still being explored.[109] The recognition that the persona of an individual may be commercially valuable and should be protected as a property interest has taken some time to catch on among California lawmakers.[110]

Indeed, the precise substantive meaning of the right of publicity

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[109] As one commentator put it: "To state that the contours of the right [of publicity] are still being refined is clearly an understatement." DONALD E. BIEDERMAN, LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 83 (1992).

[110] Another reason the law has been slow to develop is that there have not been many right of publicity cases decided by the courts. This may be due to the relatively small circle of potential plaintiffs, who are mainly celebrities.

has still not been definitively decided. While the policy basis for having the right in the first place is well-grounded in reason and has been accepted by California's legislature and courts, the right itself has been accidentally spread over three different doctrines. Some may praise the development of three separate rights of publicity as appropriately detailed. Others, however, view the distinctions between the doctrines as without a difference. At its most basic level, the argument that the distinctions do not make sense rests on the fact that the right of publicity, as a property right, seeks to compensate its holder for the unauthorized appropriation of a commercially valuable persona. This compensation does not turn on whether the individual is living or dead, or whether the persona takes the form of a name, voice, signature, photograph, likeness, or other manifestation of image. The only determinant issue should be assessing the value of the persona that was commercially appropriated by the defendant.

To reach this issue in any right of publicity case, a court must be allowed to determine the "primary message" in each new situation it faces. Especially at the current stage in the development of the law, when the right of publicity has only been considered in a handful of cases, it is important that judges are not forced to apply broad statutory exemptions. The unfortunate development of three separate rights seems to reflect the failure of the legislature to remain faithful to the policies and justifications supporting the right of publicity. It seems that in its haste to prevent possible unjust results, the California legislature decided to adopt a structurally rigid analysis that protects publicity rights only in situations not fitting into certain broad forms of exemption.

In order to correct this undesirable situation, the right of publicity should be brought under one definition—it should be one right. And, although the legislature has caused much of the present discontinuity, a legislative solution seems more appropriate than a judicial one. First, the two current right of publicity statutes include many provisions that appropriately define other aspects of the right, such as the meaning of "photograph,"[111] provisions for nominal

[111] *See* CAL. CIV. CODE §§ 3344(b), 990(i) (West Supp. 1994).

damages,[112] and procedures for claiming rights as a successor-in-interest to a deceased personality.[113] Second, a statutory right is more permanent and predictable than a right framed solely by the common law. The legislature has seen fit to enact two statutes recognizing the right of publicity, and to abandon a statutory solution at this point would suggest that lawmakers are less than convinced that the right still deserves protection.

A proper statutory solution, which would unify the right of publicity under one heading, should do the following: (1) mandate the standard of liability defined by the common law, which allows a balanced inquiry into the "primary message" of the use of persona; (2) allow the right to extend beyond the five specific aspects of persona prescribed by the statutes; and (3) make the exemptions for specific types of use suggestive rather than mandatory. It is hoped that by making the right of publicity less structurally rigid and employing a more balanced analysis, the merits of honoring a publicity right versus allowing free use of persona can be reconciled in a rational and consistent way, while permitting sufficient flexibility to meet the need to do justice in individual cases.

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[112] *See id.* §§ 3344(a), 990(a).

[113] *See id.* § 990(d)-(f).