

PARIS HILTON AVOIDS GETTING SLAPPED: THE
APPLICATION OF CALIFORNIA'S ANTI-SLAPP STATUTE
TO A RIGHT OF PUBLICITY CLAIM IN
*HILTON V. HALLMARK CARDS*¹

I. INTRODUCTION

Anyone who watches television or reads the newspaper has likely heard of Paris Hilton.² As a rich socialite who grew up living in posh neighborhoods in both New York and California, she is described as “famous for being famous.”³ With so many news and gossip stories about her, it would seem natural for her face and words to appear in the media.⁴ Yet, when Hallmark Cards began selling a birthday card with Hilton’s face and her familiar catch phrase, “That’s Hot,” Hilton brought a suit claiming that Hallmark misappropriated her right of publicity.⁵ Hallmark then countered with a

1. *Hilton v. Hallmark Cards*, 580 F.3d 874 (9th Cir. 2009), *petition for reh’g denied*, 599 F.3d 894 (9th Cir. 2010).

2. *See, e.g.*, Associated Press, *Paris Hilton Gets Jail Term*, N.Y. TIMES, May 5, 2007, at A11, *available at* http://www.nytimes.com/2007/05/05/us/05hilton.html?_r=1&scp=1&sq=Paris+Hilton+jail&st=nyt (explaining Hilton sent to jail for forty-five days for driving with suspended license while on probation for alcohol-related reckless driving); Lola Ogunnaike, *Sex, Lawsuits and Celebrities Caught on Tape*, N.Y. TIMES, Mar. 19, 2006, at II, *available at* <http://www.nytimes.com/20-06/03/19/fashion/sundaystyles/19tapes.html?scp=1&sq=Paris+Hilton+sex+tape&st=nyt> (discussing distribution of Hilton’s sex tape with former boyfriend Rick Solomon); Lindsay Barnett, *More California Chihuahuas to be Transported Out Of State for Adoption in Response to Shelter Glut*, L.A. TIMES, Dec. 30, 2009, *available at* <http://latimesblogs.latimes.com/unleashed/2009/12/more-california-chihuahuas-to-be-transported-out-of-state-for-adoption-in-response-to-shelter-glut.html> (quoting spokeswoman for San Francisco animal care and control department who refers to increase in number of Chihuahuas at animal shelters as “Paris Hilton syndrome”).

3. Scoreboard Media Group, *Paris Hilton Rule: Famous For Being Famous*, SCOREBOARD MEDIA, Feb. 6, 2007, <http://www.scoreboard-media.com/paris-hilton-rule/> (describing how to create successful marketing projects based on Paris Hilton model); *see also* Biography for Paris Hilton, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0385296/bio> (last visited Oct. 5, 2010) (describing life of Paris Hilton).

4. *See, e.g.*, Matt McGee, *Paris Hilton is Top Twitter Search Celebrity*, SEARCHENGINE-LAND.COM, April 8, 2009, <http://searchengineland.com/paris-hilton-top-twitter-search-celebrity-17256> (stating Paris Hilton is fourth most searched twitter account overall and most-searched celebrity twitter account); Wendy Boswell, *The Top 25 Web Searches of the Decade*, ABOUT.COM, <http://websearch.about.com/od/enginesanddirectories/tp/top-web-searches-of-the-decade.02.htm> (last visited Oct. 5, 2010) (naming Hilton as twenty-first most popular web search from 2000-2009).

5. *See Hilton*, 599 F.3d at 894 (affirming district court’s denial of Hallmark’s special motion to strike pursuant to California’s anti-SLAPP statute).

special motion to strike pursuant to California's anti-SLAPP statute.⁶

Since its inception in 1953, the right of publicity has expanded dramatically.⁷ What began as the protection of a famous individual's economic interest in the use of one's image has ballooned into a right that makes others liable for a product or service that simply "evokes" the image of a famous individual.⁸ Such cases are especially prevalent in the Ninth Circuit, which hears cases from the Hollywood area.⁹ Critics of the expanding right of publicity have noted that it interferes with defendants' First Amendment protections obstructing their ability to express ideas using the image or likeness of a famous individual.¹⁰

Just as right of publicity cases conflict with the First Amendment protections of the defendants, so-called Strategic Lawsuits Against Public Participation ("SLAPP") aim to hinder the free expression of political views protected by the First Amendment.¹¹

6. See CAL. CIV. PROC. CODE § 425.16 (West 1992) (declaring that "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process").

7. See K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 524 (2008) (explaining copyright, trademark and patent protection have also all expanded through both judicial decisions and legislation). Greene explains that the scope of the right of publicity has expanded most noticeably in terms of which indicia of identity can be protected. See *id.* at 527 (remarking that "[w]hile there is abundant scholarship critiquing the right of publicity, there are few truly robust defenses of the doctrine or its theoretical rationales").

8. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398-99 (9th Cir. 1992) [hereinafter *White I*], *petition for reh'g en banc denied*, 989 F.2d 1512 (9th Cir. 1993) (holding Vanna White had right of publicity claim against company that created television commercial starring robot with blonde wig and pearls standing in front of game board similar to that of Wheel of Fortune, even though neither White's face nor voice were in commercial); see also, *Wendt v. Host Int'l*, 125 F.3d 806 (9th Cir. 1997) (recognizing actors' right of publicity in fictional characters they represented on popular television show).

9. See *White v. Samsung Elecs.*, 989 F.2d 1512, 1521 (9th Cir. 1993) [hereinafter *White II*] (Kozinski, J., dissenting) (noting livelihood of "cultural icons" depends on Ninth Circuit's decisions).

10. See generally Erika Paulsrude, Note, *Not the Last Dance: Astaire v. Best Films & Video Corp. Proves California Right of Publicity Statutes and the First Amendment Can Co-Exist*, 18 LOY. L.A. ENT. L.J. 395 (1998) (analyzing *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297 (9th Cir. 1997), where video clips of dancer Fred Astaire were used in instructional dance video, and court concluded use of footage was entitled to First Amendment protection because use was related to entertainment and education under the Fair Use exception); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003) (discussing intersection of First Amendment protection and right of publicity).

11. See Jeremiah A. Ho, *I'll Huff and I'll Puff—But Then You'll Blow My Case Away: Dealing with Dismissed and Bad-Faith Defendants Under California's Anti-SLAPP*

Such cases have been overwhelming the court system in recent years.¹² Many states, including California, have enacted anti-SLAPP statutes to deter meritless claims that stifle First Amendment rights.¹³ Unfortunately, while the anti-SLAPP statute is often invoked effectively in defamation and libel cases, California's anti-SLAPP statute has proven ineffective in reducing the number of right of publicity claims.¹⁴

Right of publicity cases are not the normal arena for anti-SLAPP motions.¹⁵ Such cases do, however, share some of the characteristics of other SLAPP suits.¹⁶ Most importantly, SLAPP suits allow wealthy parties to prevent others from exercising their First Amendment rights by filing expensive and time-consuming suits.¹⁷ For many who would like to express their opinions, it is easier to simply refrain from expressing those opinions rather than to endure having a right of publicity case brought against them.¹⁸ But courts should consider whether anti-SLAPP motions should apply

Statute, 30 WHITT. L. REV. 533, 534 (2009) ("Essentially, SLAPP actions are lawsuits directed at private citizens, primarily as retaliation for some specific exercise of the political process.").

12. *See id.* (noting that while SLAPP cases have been brought in courts for centuries, only recently have they been characterized as such). "Although the legal taxonomy of SLAPP suits . . . has been relatively recent within the American legal landscape, lawsuits that have attempted to interfere with the public's right to petition have existed since the American Revolution. . . ." *Id.* (outlining recent characterization of SLAPP suits).

13. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-751- 12-752 (2006); DEL. CODE ANN. tit. 10 §§ 8136-8138 (1992); FLA. STAT. ANN. § 718.1224 (LexisNexis 1998); 14 ME. REV. STAT. ANN. tit. 14 § 556 (1995); NEV. REV. STAT. §§ 41.635 – 41.670 (1993); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (Consol. 1992); R.I. GEN. LAWS §§ 9-33-1 9-33-4 (1995); WASH. REV. CODE §§ 4.24.500-4.24.520 (1989). For a complete list of states with current anti-SLAPP legislation and states with anti-SLAPP bills, *see* California Anti-SLAPP Project, *Other States: Statutes and Cases*, <http://www.casp.net/statutes/menstate.html> (last visited Oct. 5, 2010).

14. *See* James E. Grossberg & Dee Lord, *California's Anti-SLAPP Statute*, COMM. LAW., Fall 1995, at 3 -4 (1995) ("[California's anti-SLAPP statute's] ultimate effectiveness may depend on the outcome of several key interpretive issues."). According to Grossberg & Lord, questions that are not directly answered by the statute include: (1) who is protected?; (2) is all "public" speech covered?; and (3) how high is the threshold for showing legal and factual validity? *See id.* at 4 (outlining evolution of California's anti-SLAPP statute).

15. *See id.* (listing defamation, business torts and intentional infliction of emotional distress as "the typical SLAPP causes of action").

16. *See id.* (describing characteristic SLAPP suits).

17. *See id.* ("SLAPP plaintiffs usually seek astronomical damages as part of their strategy of intimidation.").

18. *See* Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 804-05 (explaining dilemma facing SLAPP suit defendants).

to right of publicity claims.¹⁹ One of the hallmarks of a SLAPP suit is that the plaintiff is not truly concerned with winning the case; he or she simply wants to stop the defendant's actions immediately.²⁰ Celebrities filing right of publicity claims, on the other hand, do want to win their case.²¹ Although anti-SLAPP statutes theoretically should not apply to right of publicity cases because of their divergence from characteristic SLAPP suits, California's anti-SLAPP statute has been applied to right of publicity cases in a few instances.²² As *Hilton v. Hallmark* illustrates, even when anti-SLAPP motions are used they will not likely succeed in right of publicity cases.²³ Instead, to limit the number of right of publicity cases, the right of publicity doctrine itself needs to be changed.²⁴

This Note will examine the Ninth Circuit Court's application of California's anti-SLAPP statute to the right of publicity cause of action in *Hilton v. Hallmark* and the impact this decision will have on right of publicity law.²⁵ Section II discusses the facts of Hilton's

19. See *Hilton v. Hallmark Cards*, 580 F.3d 874, 885 (9th Cir. 2009) (finding no language in statute excluding right of publicity claims from applicability of California's anti-SLAPP statute).

20. See Tate, *supra* note 18, at 803-04 (2000) (describing purpose and resulting danger of SLAPP suits); Grossberg, *supra* note 14, at 4 (“[T]he purpose is not to win the lawsuit but to overwhelm the defendant with the inconvenience and expense of litigation. . . . Indeed, lack of merit is a hallmark of a SLAPP suit. . .”).

21. See Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 251 (articulating use of Locke's labor theory to justify right of publicity based on individuals' moral claim to results of his labor and economic incentive created by right to exclude others from such results). According to John Locke, “every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Therefore, it is argued that individuals have property interests in their personas that they have created and thus have the right to exclude others from using their identity so that the economic value of their identity does not decrease. See McKenna, *supra*, at 251 (noting Lockean theory of property). Another reason celebrities would want to win a right of publicity case, is because everyone has a right to define themselves by associating themselves with certain activities and objects. See *id.* (noting celebrity desire to win right of publicity cases).

22. See CAL. CIV. PROC. CODE § 425.16 (West 1992) (outlining applicability of anti-SLAPP statute).

23. For a further discussion of the ineffectiveness of anti-SLAPP motions in right of publicity cases, see *infra* notes 173-196 and accompanying text.

24. See Volokh, *supra* note 10, at 930 (expressing view that right of publicity “hasn't yielded far enough” to First Amendment rights); *but cf.* Paulsruide, *supra* note 10, at 398 (“[Although seemingly inconsistent with the recent practice of the Ninth Circuit, the *Astaire* decision appropriately resolved the conflict between the right of publicity and the First Amendment. . .”).

25. For a further discussion of the application of California's anti-SLAPP statute in *Hilton v. Hallmark* and the impact on right of publicity law, see *infra* notes 153-205 and accompanying text.

case against Hallmark and the procedural history that brought the case to the Ninth Circuit.²⁶ Section III explains the evolution of right of publicity law and the enactment of the anti-SLAPP statute in California.²⁷ Sections IV and V discuss the Ninth Circuit's analysis of the application of the anti-SLAPP special motion to strike to a right of publicity claim.²⁸ Finally, Section VI describes the likely impact that *Hilton v. Hallmark* will have on right of publicity cases in California.²⁹

II. FACTS AND PROCEDURAL HISTORY

Paris Hilton, an heir to the Hilton Hotel empire, is known mostly for her status as a socialite and for her infamous sex tape.³⁰ Hilton is also known for her catchphrase, "That's hot," which she registered with the United States Patent and Trademark Office.³¹ In 2003, Hilton appeared on a reality television show, "The Simple Life," in which she and her childhood best friend, Nicole Ritchie, travel the country to perform jobs they are unaccustomed to; in one episode, Hilton and Ritchie work in a Sonic Burger fast-food restaurant.³²

The conflict in this case revolved around a birthday card sold by Hallmark Cards, a national retailer of greeting cards.³³ The card at issue contained a cartoon picture of a waitress on which Hilton's head was super-imposed with the caption: "Paris's First Day as a Waitress."³⁴ In the picture, Hilton tells a customer, "Don't touch that, it's hot."³⁵ The customer responds by asking, "What's hot?" to

26. For a further discussion of the facts and procedural history of *Hilton v. Hallmark*, see *infra* notes 30-43 and accompanying text.

27. For a further discussion of the background of California's right of publicity law and anti-SLAPP statute, see *infra* notes 44-152 and accompanying text.

28. For a further discussion of the court's analysis in *Hilton v. Hallmark*, see *infra* notes 153-72 and accompanying text.

29. For a further discussion of the impact *Hilton v. Hallmark* will have on right of publicity cases, see *infra* notes 196-205 and accompanying text.

30. See Biography for Paris Hilton, *supra* note 3 (detailing fame of Paris Hilton). An intimate video of Hilton with her then-boyfriend, Rick Solomon, was released over the internet in November 2003. See Jimmy Greenfield, *Sex Video Fiascos*, CHICAGO TRIBUNE, July 21, 2005, at 39 (discussing Hilton's sex video scandal).

31. See *Hilton*, 580 F.3d at 879 ("Hilton says, 'that's hot,' whenever she finds something interesting or amusing").

32. See *id.* (describing episode titled "Sonic Burger Shenanigans").

33. See *id.* (defining issue of case as "whether California law allows a celebrity to sue a greeting card company for using her image and catchphrase in a birthday card without her permission").

34. See *id.* ("The picture depicts a cartoon waitress, complete with apron, serving a plate of food to a restaurant patron.").

35. See *id.* (describing birthday card at issue).

which Hilton answers, “That’s hot.”³⁶ The greeting on the inside of the card says, “Have a smoking, hot birthday.”³⁷

When Hilton brought suit in the United States District Court for the Central District of California, she alleged misappropriation of publicity under California common law, false designation under the Lanham Act and infringement of a federally registered trademark.³⁸ The district court granted Hallmark’s motion to dismiss the trademark infringement claim under Fed. R. Civ. Pro. 12(b)(6), but denied Hallmark’s motions to dismiss the right of publicity claim and the false designation claim.³⁹ Hallmark also filed a motion to strike Hilton’s right of publicity claim under California’s anti-SLAPP statute, which the district court also denied.⁴⁰ Hallmark appealed the denial of both motions.⁴¹ The Circuit Court for the Central District of California denied Hallmark’s special motion to strike because Hallmark was not, as a matter of law, entitled to the transformative use defense for the misappropriation of the right of publicity claim.⁴² Therefore, Hilton had “at least some probability of prevailing on the merits before a trier of fact.”⁴³

III. BACKGROUND

Cases in which a defendant files an anti-SLAPP motion are nothing new to the Ninth Circuit.⁴⁴ Likewise, right of publicity cases have become increasingly common, especially in the Ninth Circuit where cases originating in Hollywood are heard.⁴⁵ As these two doctrines have developed and expanded, it was only a matter of

36. *See id.* (explaining caption on outside of birthday card).

37. *See Hilton*, 580 F.3d at 879. (describing greeting on inside of birthday card).

38. *See id.* (setting forth Hilton’s First Amendment claims).

39. *See id.* (“Hallmark filed a motion to dismiss each claim. . .for failure to state a claim on which relief could be granted.”).

40. *See id.* at 880 (detailing district court’s rulings).

41. *See id.* (explaining district court “concluded that the defenses required a more fact-intensive inquiry than is permissible at such stage of the case”).

42. *See id.* at 891 (analyzing Hallmark’s assertion that greeting card was transformative).

43. *Id.*

44. *See* Jerome I. Braun, *California’s Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 735-36 (2003) (outlining cases involving California’s anti-SLAPP statute).

45. *See White*, 989 F.2d at 1521 (Kozinski, J., dissenting) (“For better or worse, we are the Court of Appeals for the Hollywood Circuit.”).

time before they would collide in a case where the boundaries of First Amendment protections would be tested.⁴⁶

A. Right of Publicity

1. *Emergence of right of publicity cause of action*

The first case recognizing a right of publicity was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁴⁷ There, the plaintiff was a manufacturer of chewing gum who entered into an exclusive licensing agreement with a baseball player to use his picture on the gum packaging.⁴⁸ Defendant was a rival company who induced the same baseball player to license it the right to use his picture for its gum, even though the baseball player had told the plaintiff company that it had the exclusive right to use his picture.⁴⁹ The defendant argued that the only applicable cause of action would be the right of privacy, but that a right of privacy was not assignable, implying that the plaintiff had no property right in the baseball player's privacy.⁵⁰ However, the court held that in addition to a right of privacy, individuals have a right of publicity whereby they can "grant the exclusive privilege of publishing [their] picture. . . without an accompanying transfer of a business or of anything else."⁵¹ As a result, the exclusive grant for the use of the baseball player's picture to the plaintiff rendered the subsequent grant to defendant void during the term of plaintiff's agreement with the baseball player, and plaintiff thus had a valid claim against defendant.⁵² The court reasoned that celebrities have an interest in receiving money for the use of their images in advertisements, and without the exclusive right to control such use, the celebrities would be deprived of any economic benefit.⁵³

46. See Paulsrude, *supra* note 10, at 397-98 (noting that broad interpretation of right of publicity "may conflict with the First Amendment's core values, such as fostering a marketplace of ideas where knowledge and truth can be freely disseminated"); see also Volokh, *supra* note 10, at 904 (asking, "When does the First Amendment protect the speaker's right to engage in [expressive] speech, and when may the right of publicity lawfully constrain speakers?").

47. See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (recognizing individuals' "right of publicity" and coining the term).

48. See *id.* at 867 (setting forth facts of case).

49. See *id.* (explaining legal issue of case).

50. See *id.* (stating that plaintiff's contract with baseball player simply released plaintiff's liability for invading baseball player's right of privacy by using his picture).

51. *Id.* at 868 (holding individuals have "right of publicity").

52. See *id.* at 869 (describing effects of court's holding).

53. See *id.* at 868 (explaining reasoning of court).

2. *Supreme Court's recognition of right of publicity*

More than twenty years after the right of publicity was first recognized, the Supreme Court finally explicitly authorized states to provide their citizens with the right of publicity.⁵⁴ In *Zacchini v. Scripps-Howard Broadcasting Co.*, the plaintiff performed a “human cannonball” act whereby he was shot from a cannon into a net in front of spectators at a county fair.⁵⁵ Although the plaintiff had asked a reporter for the defendant broadcasting company not to film the act, the reporter filmed the act.⁵⁶ The defendant broadcasting company then aired the fifteen seconds of footage on the news.⁵⁷ When the plaintiff performer sued the defendant broadcasting company for “unlawful appropriation of plaintiff’s professional property,” the trial court granted the defendant’s motion for summary judgment.⁵⁸ The court of appeals reversed, and the Ohio Supreme Court held that the plaintiff had stated a cause of action for a violation of his right of publicity.⁵⁹ The court then found that, although the defendant had violated the plaintiff’s right of publicity, the First and Fourteenth Amendments immunized the defendant from liability because of the legitimate interest in reporting the news.⁶⁰

The Supreme Court granted a writ of certiorari to resolve the issue of whether the defendant was immunized from its violation of plaintiff’s state law right of publicity by virtue of the First and Fourteenth Amendments.⁶¹ The court began by criticizing the Ohio Supreme Court’s reliance on *Time Inc. v. Hill*,⁶² which involved a right of privacy action rather than a right of publicity action.⁶³ The

54. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 (1977) (holding Constitution does not prevent states from protecting individuals’ right of publicity). The situation in which there is “appropriation of the very activity by which the entertainer acquired his reputation in the first place” is the “strongest case for a ‘right of publicity.’” *Id.* at 576.

55. See *id.* at 563 (explaining facts of case).

56. See *id.* at 563-64 (describing source of legal issue).

57. See *id.* at 564 (pointing out actions of defendant that led to lawsuit).

58. *Id.*

59. See *id.* (noting appellate court’s reversal of district court’s ruling).

60. See *id.* at 565 (“A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual’s right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.” (citation omitted)).

61. See *id.* (noting reason for grant of writ of certiorari).

62. 385 U.S. 374 (1967).

63. See *Zacchini* 433 U.S. at 571-72 (discussing Ohio Supreme Court’s reliance on *Time Inc. v. Hill*, 385 U.S. 374 (1967)).

Court explained that the right of privacy and the right of publicity are grounded on different rationales.⁶⁴ While the right of privacy centers on the protection of individuals' reputation, the right of publicity focuses on guaranteeing individuals the right to benefit economically from their efforts.⁶⁵ Even though the clip that aired on the news was only fifteen seconds in length, it showed plaintiff's entire performance, and the Supreme Court explained that showing an entire performance decreases the economic value of the act.⁶⁶ The Court concluded "the Constitution does not prevent Ohio from . . . deciding to protect the entertainer's incentive in order to encourage the production of this type of work."⁶⁷

3. *Further developments*

After the Supreme Court authorized states to offer protection for the right of publicity, a profusion of cases in which celebrities asked for such protection emerged.⁶⁸ With many courts ruling in favor of celebrities for a wide variety of claims, the scope of the right of publicity began to expand.⁶⁹ In *Midler v. Ford Motor Co.*, the Ninth Circuit added "voice" to the list of celebrity attributes that are protected by the right of publicity.⁷⁰ In that case, Ford Motor Company ("Ford") hired one of Bette Midler's former backup singers to imitate Midler's voice for one of its commercials.⁷¹ Ford and its advertising agency asked the backup singer to perform one of Midler's famous songs and directed her to "sound as much as possible like the Bette Midler record."⁷² The backup singer was successful,

64. *See id.* at 573 (noting State's interest in protecting citizens against infringements of their right of privacy differ from those of protecting citizens against infringements of their right of publicity).

65. *See id.* (comparing rationale for right of publicity to justifications for patent and copyright while comparing rationale for right of privacy to justifications for emotional distress and defamation).

66. *See id.* at 575 ("If the public can see the act free on television, it will be less willing to pay to see it at the fair.").

67. *Id.* at 577. The court noted that even though First and Fourteenth Amendment do not require privileging news reporters, Ohio can choose to add more protection to news reporters. *See id.* (discussing increased protection for news reporters).

68. *See* Greene, *supra* note 7, at 524 (remarking that right of publicity doctrine has expanded greatly).

69. *See id.* at 527 (noting increasing variety of right of publicity claims)

70. 849 F.2d 460, 463 (9th Cir. 1988) (holding "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California").

71. *See id.* at 461 (explaining facts of case).

72. *Id.*

and many people testified that they believed the voice singing the song was Midler herself.⁷³

When Midler sued Ford, the court found that there was no copyright infringement because Ford had a license to use the copyrighted song, and that there was no unfair competition because Midler does not perform in television commercials.⁷⁴ The court did, however, find that Midler had a proprietary interest in her voice as an attribute of her identity, and that “to impersonate her voice is to pirate her identity.”⁷⁵ The Ninth Circuit thus held that Ford had misappropriated Midler’s identity for the purpose of selling its product, therefore infringing Midler’s right of publicity.⁷⁶

More recently, the California Supreme Court set forth a balancing test in *Comedy III Productions, Inc. v Gary Saderup, Inc.* to weigh First Amendment protections against the right of publicity, and used the standard of whether “the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”⁷⁷ There, the plaintiff was the registered owner of rights to The Three Stooges.⁷⁸ The defendant was an artist known for depicting celebrities in charcoal drawings, which were then used to make lithographic prints on T-shirts.⁷⁹ While noting that images of celebrities are “important expressive and communicative resources” for the public, the court explained that “depictions of celebrities amounting to little more than the appropriation of the celebrity’s economic value are not protected expressions under the First Amendment.”⁸⁰ Drawing from the realm of copyright law, which shares the justification of protecting “creative fruits of intellectual and artistic labor” with the right of publicity, the Court stated that to be entitled to First

73. *See id.* at 462 (stating backup singer and Midler were both told by numerous people that song sounded as though Midler was singing it).

74. *See id.* (“Midler does not seek damages for Ford’s use of ‘Do You Want to Dance,’ and thus her claim is not preempted by federal copyright law. . . . A voice is not copyrightable. The sounds are not ‘fixed.’”).

75. *Id.* at 463 (“A voice is as distinctive and personal as a face.”).

76. *See id.* at 463-64 (holding right of publicity applied to distinctive voice).

77. 21 P.3d 797, 799 (Cal. 2001). The court concluded that the defendant’s product contained no creative elements so the plaintiff’s right of publicity prevails over the defendant’s First Amendment rights. *See id.* (ruling in favor of plaintiff’s right of publicity).

78. *See id.* at 800 (stating that The Three Stooges are deceased personalities who once made up former comedy act).

79. *See id.* (stating defendant created drawings and was active participant in t-shirt production).

80. *Id.* at 803, 805 (explaining court’s rationale for recognizing right of publicity).

Amendment protections a work cannot be a mere “literal description or imitation of a celebrity.”⁸¹ The artistic work must, said the court, be transformative in some way.⁸²

Similarly, in *Guglielmi v. Spelling-Goldberg Productions*, the defendant publishing company aired a movie on television which they described as a “fictionalized version” of the life of the deceased silent motion-picture actor Rudolph Valentino.⁸³ The plaintiff, who was the nephew of Valentino, sued the defendant for infringement of Valentino’s right of publicity, seeking both damages and injunctive relief.⁸⁴ Although Valentino’s right of publicity was assignable to his nephew and Valentino had a right of publicity in his name, voice and likeness, the court ultimately held that the defendant did not infringe upon Valentino’s right of publicity because the film was transformative.⁸⁵

In contrast, in *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the Ninth Circuit held that the use of a picture of a distinctive race car in an advertisement for a tobacco product was an infringement of the race car driver’s right of publicity.⁸⁶ Neither the race car driver’s picture nor his name were in the advertisement, but the court held that the car was part of his identity since the car would be recognized as his and associated with him.⁸⁷

The Ninth Circuit summarized its right of publicity case law when it stated that the right includes anything that “evokes” a celebrity’s personality.⁸⁸ As the apex of right of publicity in the Ninth Circuit, *White v. Samsung Electronics America, Inc.* held that a com-

81. *Id.* at 808 (explaining right of publicity shares with copyright law goal of encouraging free expression and creativity by protecting results of one’s efforts).

82. *See id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), which concluded fair use defense to copyright infringement requires new work to be transformative, “altering the first with new expression, meaning or message”).

83. 603 P.2d 454, 455-56 (Cal. 1979). The court explained the conflict between actor’s nephew and production company over film titled, “Legend of Valentino: A Romantic Fiction.” *See id.* (detailing conflict over the film).

84. *See id.* at 456 (summarizing plaintiff’s argument that defendant falsely depicted Valentino in fictional movie for profit, thereby appropriating Valentino’s identity).

85. *See id.* at 462 (explaining holding of case, in which California Supreme Court affirmed trial court’s dismissal of plaintiff’s complaint).

86. 498 F.2d 821, 827 (9th Cir. 1974). “[T]hese markings were not only peculiar to the plaintiff’s cars but they caused some persons to think the car in question was plaintiff’s and to infer that the person driving the car was the plaintiff.” *Id.*

87. *See id.* at 826-27 (explaining that while plaintiff’s “likeness” is unrecognizable, plaintiff is still identifiable because of car’s “distinctive decorations”).

88. *See White I*, 971 F.2d 1395, 1398-99 (9th Cir. 1992) (refusing to limit right of publicity claims to only appropriation of “name or likeness”).

mercial for Samsung Electronics which featured a female robot in front of a “Wheel of Fortune” board was sufficient for Vanna White to claim infringement of her common law right of publicity.⁸⁹ The court stated that limiting right of publicity claims to a defined list of appropriations would “effectively eviscerate” the right because celebrities’ identities can easily be appropriated through means other than their name and likeness.⁹⁰ As a result, celebrities are able to sue a defendant who creates anything that merely “evokes” their personality, greatly infringing on the defendant’s First Amendment rights to express oneself freely.⁹¹

B. California’s Anti-SLAPP Statute

1. *Language of the statute*

The California legislature was one of the first states to enact an anti-SLAPP statute in 1992.⁹² California Civil Procedure Code Section 425.16 provides that:

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.⁹³

The stated purpose of the statute is “to encourage continued participation in matters of public significance.”⁹⁴ The legislature was concerned with increasing numbers of suits brought for the purpose of stifling the First Amendment rights of defendants.⁹⁵ In

89. *See id.* at 1399 (holding district court erred in rejecting White’s right of publicity claim on summary judgment).

90. *See id.* (“Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict.”).

91. *See White II*, 989 F.2d 1512, 1512 (9th Cir. 1993) (Kozinski, J., dissenting) (disagreeing with majority’s denial of rehearing *en banc*). “Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to anything that reminds the viewer of her.” *Id.*

92. *See Braun, supra* note 44, at 731 (2003) (describing progress of courts applying California’s anti-SLAPP statute).

93. CAL. CIV. PROC. CODE § 425.16(c)(1) (West 1992) (entitling successful defendant to recover attorney’s fees and costs).

94. *Id.* (noting statute is to be construed broadly to meet its purposes).

95. *See id.* (“The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of griev-

particular, such suits aim to silence the political message of the defendants.⁹⁶ Some states' anti-SLAPP statutes specifically limit the special motions to strike only to cases involving the right to petition the government, not free speech in general.⁹⁷

The anti-SLAPP statute provides a procedural mechanism for defendants to halt discovery through a special motion to strike, thus potentially saving the defendant the time and expense of full discovery.⁹⁸ In other words, the defendant does not need to wait until the summary judgment phase in order to dismiss the suit.⁹⁹ The statute also provides for a successful defendant to receive attorney's fees and costs.¹⁰⁰ An amendment in 1999 added that a plaintiff or defendant could immediately appeal a decision to grant or deny the special motion to strike.¹⁰¹

ances."); *see also* Johnathan Segal, *Anti-SLAPP Law Make Benefit For Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment*, 26 *CARDOZO ARTS & ENT. L.J.* 639, 644-45 (2009) (outlining findings of Pring and Canan, scholars credited with identifying problem of SLAPP suits and proposing procedural measure to remedy problem). Pring and Canan explained that the major concern with SLAPP suits was that they moved political disputes from "the public arena" and into "the less-appropriate venue of the courthouse, with its attendant costs." *Id.*

96. *See* George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPS"): An Introduction for Bench, Bar, and Bystanders*, 12 *BRIDGEPORT L. REV.* 937, 946-47 (1992) (concluding four elements of SLAPP suit are "1. A civil complaint or counterclaim, 2. Filed against nongovernmental individuals or organizations, 3. Because of their communications to a government (government body, official, or the electorate), 4. On a substantive issue of some public interest or concern").

97. *See* Tate, *supra* note 18, at 812 (noting California's anti-SLAPP statute goes beyond scope of traditional anti-SLAPP statutes by protecting more than just petition-related speech). For example, Minnesota's anti-SLAPP statute protects "lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action." *MINN. STAT. ANN.* § 554.03 (West. Supp. 2000).

98. *See* Tate, *supra* note 18, at 801 (explaining benefits of anti-SLAPP statute). The statute does, however, allow the court to decide that certain discovery be continued upon a showing of good cause. *See* *CAL. CIV. PROC. CODE* § 425.16(g).

99. *See* Tate, *supra* note 18, at 811 (describing how special motion to strike "shifts the moment of judicial intervention back from the summary judgment state to the motion to dismiss stage"). The statute specifies the time frame for filing a special motion to strike as "within 60 days of the service of the complaint." *See* *CAL. CIV. PROC. CODE* § 425.16.

100. *See* Tate, *supra* note 18, at 801 (referring to provision as deterrent to bringing SLAPP suits). Section (c)(1) of California's anti-SLAPP statute provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." *CAL. CIV. PROC. CODE* § 425.16(c)(1). The same section also provides, however, that "if the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion." *Id.*

101. *See* Tate, *supra* note 18, at 808 (noting amendment was added to "further the purpose of the anti-SLAPP statute") (internal quotations omitted).

2. *Common law in California*

Over the years since California's anti-SLAPP statute was enacted and amended, the courts have been charged with interpreting the statute.¹⁰² The California Court of Appeals in *Wilcox v. Superior Court* ruled that the defendant-movant has the burden of proof for showing that the anti-SLAPP statute applies.¹⁰³ A showing that the anti-SLAPP statute applies involves proving that the plaintiff's claim arose from defendant's act "in furtherance of [his or her] right of petition or free speech . . . in connection with a public issue."¹⁰⁴ As a result, courts have had to interpret what "in connection with a public issue" means.¹⁰⁵ The 1997 amendment requiring the statute to be "broadly construed" allowed courts to find that a wide variety of acts are conducted "in connection with a public issue."¹⁰⁶

In addition to resolving issues regarding burdens of proof, courts have had to define many of the terms found in the anti-SLAPP statute.¹⁰⁷ The courts have not, however, always agreed on

102. See Braun, *supra* note 44 (explaining aspects of anti-SLAPP statute that have and have not been definitively interpreted by courts).

103. 33 Cal. Rptr. 2d 446, 452 (Ct. App. 1994). The court calls this burden "fair" because defendant-movant is party who benefits from special motion to strike. See *id.* (discussing fairness of the motion).

104. CAL. CIV. PROC. CODE. § 425.16(b)(1); see also *Matson v. Dvorak*, 46 Cal. Rptr. 2d 880, 885 (Ct. App. 1995) (defining "threshold requirement" as proving "claims arose from an act in furtherance of . . . free speech"). Subsection (e) of the statute lists examples of what constitutes such an act:

- (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
- (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
- (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;
- (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

CAL. CIV. PROC. CODE. § 425.16(e) (1992).

105. See *Tate*, *supra* note 18, at 820 (noting original fears that phrase would be interpreted too narrowly).

106. See *id.* at 826 (summarizing cases where "public interest or public issue factor" was met). For example, in *Macias v. Hartwell*, the California Court of Appeals concluded that the election of a union leader was a matter of public interest because 10,000 union members would be affected. 64 Cal. Rptr. 2d 222, 225 (Ct. App. 1997). Similarly, in *Ludwig v. Superior Court*, the court concluded that the development of a discount mall was a matter of public interest because it would affect area traffic and the local environment. 43 Cal. Rptr. 2d 350, 355 (Ct. App. 1995).

107. See Braun, *supra* note 44, at 736 ("When the first cases interpreting the remedy were decided . . . California courts needed to determine nearly every issue as a matter of first impression.").

how to define such terms.¹⁰⁸ In *Rivero v. American Federation of State, County and Municipal Employees*, the California appellate court set forth three categories of public issues: (1) statements “concern[ing] a person or entity in the public eye”; (2) “conduct that could directly affect a large number of people beyond the direct participants”; (3) “or a topic of widespread public interest.”¹⁰⁹ *Weinberg v. Feisel*, on the other hand, sets forth a narrower test that defines public issue by distinguishing between public and private interests.¹¹⁰

One thing that has been definitively decided is that once the defendant meets the burden of showing that the statement or conduct at issue was “in furtherance of [his or her] right of free speech in connection with a public issue,” the burden shifts to the plaintiff to prove a probability that he or she will prevail on the merits of the case.¹¹¹ If the plaintiff is able to prove that he or she is likely to prevail on the merits, however, this finding is not admissible at any other phase of the case.¹¹²

Other important interpretations of California’s anti-SLAPP statute have emerged from cases decided since the statute’s enactment.¹¹³ In *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, the Cali-

108. *See id.* (noting appeals courts’ differing interpretations concerning anti-SLAPP issues but acknowledging authoritative resolution of most of these issues).

109. 130 Cal. Rptr. 2d 81, 89-90 (Ct. App. 2003). The court held that “supervision of a staff of eight custodians by Rivero, an individual who had previously received no public attention or media coverage” was not a matter of public interest. *Id.* The court stressed that certain activity “below some threshold level of significance is not an issue of public interest, even though it implicates public policy.” *Id.* at 90. Public interest is not established merely because the public favors certain statements or criticisms. *See id.* (defining public interest).

110. 2 Cal. Rptr. 3d 385, 392 (Ct. App. 2003). While there is no “all-encompassing” definition of “public interest,” cases have provided guidance. *Id.* The guiding principles are:

First, “public interest” does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people . . . Third, there should be some degree of closeness between the challenged statements and the asserted public interest. . . Fourth, the focus of the speaker’s conduct should be the public interest rather than a mere effort “to gather ammunition for another round of [private] controversy”. . . Finally. . . a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Id. at 392-93 (internal citations omitted).

111. *See Wilcox v. Super. Ct.*, 33 Cal. Rptr. 2d 446, 453 (Ct. App. 1994) (concluding legislature intended plaintiff’s standard to be “reasonable probability”).

112. *See CAL. CIV. PROC. CODE* §435.16(b)(3) (West 1992) (explaining success of plaintiff on special motion to strike also does not alter burden of proof during trial).

113. *See Braun, supra* note 44, at 736-40 (articulating that preamble to anti-SLAPP statute itself raised two questions for courts to answer).

ifornia Supreme Court ruled that a defendant filing a special motion to strike is not required to show that the plaintiff's suit was filed for a forbidden purpose.¹¹⁴ In other words, the plaintiff's intent is irrelevant to a defendant's ability to bring a special motion to strike.¹¹⁵

C. California's Anti-SLAPP Statute in Right of Publicity Claims

While many defendants have filed special motions to strike pursuant to California's anti-SLAPP statute, very few of these cases have involved claims for misappropriation of right of publicity.¹¹⁶ There have been no reported cases heard by the Ninth Circuit Court of Appeals involving the application of California's anti-SLAPP statute to right of publicity cases. One recent district court case involving such a claim was *Browne v. McCain*, which involved the 2008 Presidential Election.¹¹⁷ There, singer/songwriter Jackson Browne brought a suit against Senator John McCain, the Republican National Committee, and the Ohio Republican Party for the use of his song "Running on Empty" in a commercial for Presidential candidate McCain.¹¹⁸ One of Browne's claims was for misappropriation of common law right of publicity.¹¹⁹

Without explicitly discussing how California's anti-SLAPP statute applies to right of publicity claims, the District Court for the Central District of California concluded that the Republican National Committee met its burden under the first prong of the anti-SLAPP analysis because the 2008 presidential candidates were an issue of public interest.¹²⁰ Therefore, Browne's claim arose from a protected activity under the anti-SLAPP statute.¹²¹ The court then

114. *See* Equilon Enters. LLC v. Consumer Cause, Inc., 124 Cal. Rptr. 2d 507, 514 (2002) (affirming grant of defendant's special motion to strike pursuant to California's anti-SLAPP statute).

115. *See id.* (noting statute's plain language does not require defendant to "demonstrate that the plaintiff brought the cause of action complained of with the intent of chilling the defendant's exercise of speech or petition rights").

116. *See* Grossberg, *supra* note 14, at 4 (listing defamation, business torts and intentional infliction of emotional distress as "the typical SLAPP causes of action").

117. 611 F. Supp. 2d 1062, 1065 (C.D. Cal. 2009). The court denies the Republican National Convention's special motion to strike songwriter Browne's common law right of publicity claim. *See id.* (upholding right of publicity claim).

118. *See id.* (describing commercial endorsing candidate McCain which contains Browne's performance of his song playing in background).

119. *See id.* (listing Browne's other claims which were for copyright infringement, vicarious copyright infringement, and violation of Lanham Act for false association or endorsement).

120. *See id.* at 1068 (relying on statute's mandate that it be construed broadly).

121. *See id.* (explaining court's reasoning).

moved on to the second prong, where the plaintiff must show a probability of success on the merits of the case.¹²² Browne contended, and the court agreed, that he met his burden of proving each element of misappropriation of the common law right of publicity.¹²³

Although the court concluded that Browne had proven a probability of success on the merits of his right of publicity claim, the Republican National Committee asserted the affirmative defenses of “transformative use” and “public interest.”¹²⁴ The court explained that the Republican National Committee had the burden to prove these affirmative defenses by showing that the evidence bars liability as a matter of law.¹²⁵ For the public interest defense, the court reasoned that although the 2008 Presidential Election was a matter of public interest, the specific use of Browne’s song was not shown to be of public interest.¹²⁶ For the transformative use defense, the court reasoned that the portions of Browne’s songs used in the commercial were verbatim copies of his composition in his voice and that the portions “were not altered in any way.”¹²⁷

Greenstein v. Greif Company is another case where a defendant in a right of publicity case filed a special motion to strike.¹²⁸ Although this is a rare example where a defendant was successful in his anti-SLAPP motion against a right of publicity claim, the case has not been published and therefore offers no precedential value in the

122. *See id.* at 1069 (adopting “the more lenient meaning of ‘possibility’” which requires only that “plaintiff show a mere possibility of success on his claim”).

123. *See Browne*, 611 F. Supp. 2d at 1070 (finding Republic National Committee used Browne’s identity and appropriated his name or likeness to their advantage, without Browne’s consent and with resulting injury). The resulting injury in *Browne* was that the commercial “gave the false impression that [Browne] was associated with or endorsed Senator McCain’s Presidential candidacy.” *Id.*

124. *See id.* at 1071-73 (stating defendant has burden of proof for affirmative defenses raised to challenge plaintiff’s showing of probability of success on merits).

125. *See id.* (citing *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 61 Cal. Rptr.3d 29, 38 (Ct. App. 2007)) (stating that “when analyzing a defendant’s affirmative defenses on an Anti-SLAPP motion, in order to prevail, the defendant must show that its evidence bars the plaintiff’s claim as a matter of law.”).

126. *See id.* (emphasizing commercial’s commentary was targeted at Senator McCain, not Browne or his music).

127. *Id.* at 1072 (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808-09 (Cal. 2001)). “In the context of a right of publicity claim, a transformative use contemplates actual transformation of a celebrity’s likeness so that it becomes the defendant’s own expression.” *Id.*

128. No. B200962, 2009 WL 117368 at *10 (Cal. Ct. App. Jan. 20, 2009). The court affirms the grant of defendant’s special motion to strike pursuant to California’s anti-SLAPP statute. *See id.* (ruling on special motion to strike).

California courts.¹²⁹ The case involved a plaintiff who served as a segment producer for an episode of a reality television show, which detailed the daily life of rock musician Gene Simmons.¹³⁰ While the plaintiff originally planned on working only behind-the-scenes, during filming of the show he “act[ed] as an escort for Simmons and his entourage as they travelled from appearance to appearance, resulting in numerous interactions between Simmons and [plaintiff] as the cameras were rolling.”¹³¹ According to plaintiff, he never signed a written release and was therefore entitled to compensation if he appeared in the final cut of the episode.¹³²

When the episode aired, it included footage of plaintiff, who did not receive any compensation for appearing in the show.¹³³ Plaintiff then filed suit against defendant alleging misappropriation of his right of publicity.¹³⁴ When defendant filed a special motion to strike pursuant to California’s anti-SLAPP statute, the district court granted it.¹³⁵ On appeal, the intermediate court agreed that the television program was an issue of public interest because Simmons was a public figure, and plaintiff therefore “became involved in an issue of public interest when he was filmed interacting with Simmons” for an episode of the television program about the famous rock musician.¹³⁶ The appellate court also agreed that plaintiff failed to prove a probability of success on his right of publicity claims. The court found that plaintiff implicitly consented to appearing on the program by being present during filming while he

129. See CAL. RULES OF COURT, Rule 8.1115(a) (2010), available at http://www.courtinfo.ca.gov/rules/index.cfm?title=eight&linkid=rule8_1115 ([A]n opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.”).

130. See *Greenstein*, 2009 WL 117368 at *1 (describing documentary-style television show titled “Gene Simmons Family Jewels”, and particular episode titled “Shrinkwrapped”).

131. *Id.* Ironically, the plaintiff wore a microphone during filming and also was in charge of holding up a sign that informed the public that if they did not want to be filmed, they should “please stay behind the cameras.” *Id.* at *2.

132. See *id.* (discussing factual dispute between plaintiff and producers who stated they saw plaintiff sign written release).

133. See *id.* (stating producer asked plaintiff to sign release one year after filming, which plaintiff refused to do).

134. See *id.* (explaining plaintiff “asserted two causes of action for common law misappropriation in violation of his right to privacy and statutory misappropriation in violation of [CAL. CIV. CODE § 3344]”).

135. See *Greenstein*, 2009 WL 117368 at *2 (stating district court found television show “concerned an issue of public interest” and plaintiff “could not show a probability of succeeding on his claims”).

136. *Id.* at *6. Simmons was described as “the most visible performer in the popular rock band, ‘KISS.’” *Id.*

displayed a sign which stated that to avoid consenting to filming, individuals should stay behind the camera.¹³⁷

Padilla v. MRA Holding, LLC is another example of the California anti-SLAPP statute's application in right of publicity claims, but it is another unpublished case.¹³⁸ There, defendant's employee videotaped plaintiff when she removed her bathing suit top while on a boat in a public area of Lake Havasu, California.¹³⁹ Defendant then used video clips of plaintiff in one of its adult videos, which was sold over the internet and through television commercials.¹⁴⁰ After plaintiff sent defendant cease and desist letters, she filed suit against the company alleging, among other things, misappropriation of common law right of publicity.¹⁴¹ Defendant then filed a special motion to strike pursuant to California's anti-SLAPP statute, which the trial court denied.¹⁴²

In reviewing the district court's denial of the motion to strike, the appellate court agreed that plaintiff's complaint did not arise out of protected activity.¹⁴³ The court concluded that the topic of the video, plaintiff removing her bathing suit top while on vacation, was not a matter of public interest because plaintiff was not a person in the public eye, the topic did not affect a large number of people and plaintiff's private vacation was not the topic of widespread public interest.¹⁴⁴ As a result, defendant failed to meet her initial burden required for prevailing on a special motion to strike.¹⁴⁵ There was, therefore, no need to inquire into whether plaintiff had a probability of prevailing on the merits of the case, and no authority to grant defendant's motion for attorney's fees.¹⁴⁶

137. *See id.* at *9 (emphasizing plaintiff knew he was on camera).

138. No. B172540, 2004 WL 2988172 at *1 (Cal. Ct. App. Dec. 28, 2004). The court affirms the denial of defendant's special motion to strike pursuant to California's anti-SLAPP statute. *See id.* (finding no special motion to strike).

139. *See id.* (emphasizing plaintiff did not know she was being videotaped).

140. *See id.* (explaining "Girls Gone Wild" video which "depicts a variety of young women exposing their buttocks and genitals in public places").

141. *See id.* (listing other claims which were for placement in false light and unfair and fraudulent business practices).

142. *See Padilla*, No. B172540, 2004 WL 2988172 at *1 ("The trial court denied the motions to strike, holding that section 425.16 was inapplicable.").

143. *See id.* at *2 (citing *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002)).

144. *See id.* at *3-6 (applying test set forth in *Rivero v. Am. Fed'n of State, County & Mun. Employees*, 130 Cal. Rptr. 2d 81 (Ct. App. 2003)).

145. *See id.* (explaining rationale of court).

146. *See id.* (noting court also denied plaintiff's request for attorney's fees because there was no evidence defendant filed motion to strike frivolously).

Most recently, in *Stewart v. Rolling Stone LLC*, a California court of appeal issued an opinion reversing the trial court's denial of a special motion to strike pursuant to California's anti-SLAPP statute.¹⁴⁷ In that case, an "indie rock" band brought a class action lawsuit against the publisher of Rolling Stone Magazine and a tobacco company alleging both common law and statutory misappropriation of its right of publicity.¹⁴⁸ The issue arose out of a special, foldout editorial section in Rolling Stone Magazine which was flanked by advertisements for the cigarette company.¹⁴⁹ The plaintiffs claimed that the placement of the editorial, which included their band's name, in between advertisements for cigarettes was an unauthorized use of their name or likeness to sell the cigarettes.¹⁵⁰ In concluding that the editorial arose out of Rolling Stone Magazine's right of free speech, and that the plaintiffs had a likelihood of succeeding on the merits of their case, the court recognized the interplay between First Amendment rights and the right of publicity.¹⁵¹ Once again, however, the court never acknowledged that the anti-SLAPP statute was not originally intended for use in a right of publicity case.¹⁵²

IV. NARRATIVE ANALYSIS

As a threshold matter, the court in *Hilton* determined that as a Federal Circuit court sitting in diversity, they were to apply California state law, which meant that California's anti-SLAPP statute applied.¹⁵³ In determining whether to grant or deny Hallmark's

147. 105 Cal. Rptr. 3d 98, 103-04 (agreeing with defendants that "plaintiffs have failed to present evidence sufficient to establish that they have a probability of prevailing on the merits" of case).

148. *See id.* at 106 (outlining plaintiff's causes of action).

149. *See id.* at 104-05 (describing layout of feature, titled "Indie Rock Universe").

150. *See id.* at 106 ("[T]he gravamen of the complaint is that defendants and R.J. Reynolds 'used the artist names of plaintiffs and the members of the Class knowingly and deliberately for the commercial purpose of advertising Camel cigarettes' without their prior authorization").

151. *See Stewart*, 105 Cal. Rptr. 3d at 112 ("The First Amendment has been invoked by media defendants in cases involving commercial misappropriation." (emphasis omitted)).

152. *See id.* (outlining use of First Amendment as a defense in right of publicity cases, but never explicitly mentioning how anti-SLAPP statute applies to right of publicity cases).

153. *See Hilton v. Hallmark Cards*, 580 F.3d 874, 880 (9th Cir. 2009) (applying Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). The court also analyzed their ability to review the district court's denial of Hallmark's special motion to strike, concluding that appellate courts have jurisdiction to review anti-SLAPP rulings under the collateral order doctrine. *See id.* (asserting jurisdiction to review anti-SLAPP rulings).

special motion to strike, the court analyzed the case under the two-prong test.¹⁵⁴ First, the court must determine whether the defendant's act was "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."¹⁵⁵ Here, the court noted that Hallmark's conduct fell into the fourth category of protected acts set forth by the statute: "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."¹⁵⁶

This first prong contains two issues: first, whether the conduct was "in furtherance of the exercise of . . . free speech;" and second, whether the conduct was "in connection with a public issue or an issue of public interest."¹⁵⁷ According to the court, if the defendant's activity is "communicative," it will suffice as furthering the exercise of free speech.¹⁵⁸ Therefore, Hallmark's greeting card, which is meant to convey a message, "comfortably" constituted "conduct in furtherance of the exercise of free speech."¹⁵⁹

Approaching the question of whether there was a "public issue", Hilton argued that there was no "public issue" because a celebrity could not be "the subject of some defined debate."¹⁶⁰ Case law and the language of the statute itself, however, led the court to interpret "public issue or issue of public interest" as "matters of public importance or consequence."¹⁶¹ The court then looked at two California intermediate appellate court cases for their particu-

154. *See id.* at 882 ("[A]n anti-SLAPP motion requires the court to ask, first, whether the suit arises from the defendant's protected conduct, and, second, whether the plaintiff has shown a probability of success on the merits.").

155. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 1992); *see also* Equilon Enters., LLC v. Consumer Cause Inc., 52 P.3d 685, 694 (Cal. 2002) (describing "threshold showing" of defendant filing special motion to strike).

156. *Hilton*, 580 F.3d at 883. The court referred to CAL. CIV. PROC. CODE § 425.16(e)(4) as a "catch-all category." *Id.*

157. *Id.* at 883-85.

158. *See id.* at 884 (concluding California courts interpret "in furtherance of free speech rights" broadly, if analyzing that language at all).

159. *Id.* at 885. The court refused to hold whether defendant must prove conduct constituted "speech" under First Amendment analysis, but concluded that if defendant must, Hallmark would meet that burden here. *See id.* (analyzing defendant's conduct).

160. *Id.* at 885-86. "[T]he activity of the defendant need not involve questions of civic concern; social or even low-brow topics may suffice." *Id.* The court emphasized that the anti-SLAPP statute can apply when both parties are private individuals. *See id.* at 885 (applying anti-SLAPP statute when parties are both private individuals).

161. *Hilton*, 580 F.3d at 866 (citation omitted).

lar tests regarding the public issue/public interest requirement.¹⁶² Using the test set forth in *Rivero*, the court found that the Hallmark birthday card was “in connection with a public issue or an issue of public interest” because Hilton was both “in the public eye” and “a topic of widespread, public interest.”¹⁶³ Applying the narrower test set forth in *Weinberg*, the court found that Hallmark’s birthday card would still have met the public interest requirement because Hilton’s career was a “concern to a substantial number of people,” and because Hilton’s image and catchphrase (the “asserted public interest”) were directly connected to the birthday card (the “challenged statement”).¹⁶⁴ Further, the details that Hallmark’s card illustrated occurred in the public, specifically on Hilton’s television show.¹⁶⁵ The court thus concluded that Hilton’s right of publicity claim sprang from “conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest.”¹⁶⁶

Since Hallmark met its threshold burden, the court’s analysis moved on to the second prong of the anti-SLAPP statute inquiry, namely whether Hilton could prevail on the merits of her right of publicity claim.¹⁶⁷ While Hallmark did not contest that Hilton could meet each of the elements of a claim for misappropriation of the common law right of publicity, it did claim the affirmative defenses of “transformative use” and “public interest.”¹⁶⁸ In regards to the “transformative use” defense, the court reasoned that Hallmark could only succeed in its special motion to strike if it was enti-

162. *See id.* (stating California intermediate appellate courts have developed many tests to decide whether “public issue or issue of public interest” are involved have emerged in California appellate courts).

163. *Id.* at 887 (citing CAL. CIV. PROC. CODE § 425.16(e)(4) (West 1992)). The court noted that Hilton had recognized “that she [was] a ‘public figure and a subject of public interest,’ with ‘widespread public recognition.’” *Id.* at n.8. For a further discussion of the test set forth in *Rivero*, *see supra* note 109, and accompanying text.

164. *Hilton*, 580 F.3d at 886-87. Because greeting card involved both public activities and personages it met the public interest requirement. For a further discussion of the test set forth in *Weinberg*, *see supra* note 110 and accompanying text.

165. *See Hilton*, 580 F.3d at 887 (discussing *Weinberg* court’s analysis).

166. *Id.* at 888 (citing CAL. CIV. PROC. CODE § 425.16(a), (e)(4)).

167. *See id.* at 888-89 (explaining plaintiff’s burden, though existent, was not high).

168. *See id.* at 889 (providing elements of misappropriation of right of publicity claim under California law are “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of the plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury”) (citation omitted).

tled to the defense as a matter of law.¹⁶⁹ Comparing the facts here to the facts in *Comedy III*, the court found that Hallmark's card was not, as a matter of law, transformative since the depiction of Hilton on the card was almost identical to how she was depicted on the television show.¹⁷⁰ In regards to the "public interest" defense, the court quickly concluded that Hallmark was not entitled to the defense "because its birthday card does not publish or report information."¹⁷¹ Therefore, the court affirmed the trial court's denial of Hallmark's special motion to strike and remanded the case for further proceedings consistent with its opinion.¹⁷²

V. CRITICAL ANALYSIS

Despite precedent declaring that California's anti-SLAPP statute is to be construed broadly, the Ninth Circuit dismissed Hallmark's motion to strike.¹⁷³ This holding is unexpected considering that California's anti-SLAPP statute provides broader First Amendment protections than most other states' anti-SLAPP statutes.¹⁷⁴

169. *See id.* at 890 (noting while Hallmark could raise defense, Hilton could still defeat motion to strike by showing "minimal merit"). In applying the transformative use defense, the court discussed the case of *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, where the California Supreme Court framed the issue as "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." 21 P.3d at 809. Because *Comedy III* "envisioned the application of the defense as a question of fact," the court stated that Hallmark was "only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the card was not transformative." *Hilton*, 580 F.3d at 890.

170. *See Hilton*, 580 F.3d at 891 ("[I]t is clear that merely merchandising a celebrity's image without that person's consent, the prevention of which is the core of the right of publicity, does not amount to a transformative use."). The court stated that the facts in *Hilton* resembled those in *Comedy III*, where the court concluded that a drawn image of The Three Stooges on a t-shirt was not transformative. *See Comedy III*, 21 P.3d 797 at 811 (describing artist's work as "literal, conventional depictions of The Three Stooges").

171. *Hilton*, 580 F.3d at 893 (referencing *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 640-41 (1995)). In *Montana*, the court noted that the public interest defense "rests on the right of the public to know and the freedom of the press to tell it . . ." *Id.* (citation omitted).

172. *See Hilton*, 580 F.3d at 893 (affirming denial of Hallmark's motion to strike, but dismissing appeal of denial of Hallmark's motion to dismiss misappropriation of publicity claims and Lanham Act claim).

173. *See id.* at 882-83 ("Because 'it is in the public interest to encourage continued participation in matters of public significance, and [because] this participation should not be chilled through abuse of the judicial process,' the anti-SLAPP statute is to be construed broadly.") (citing CAL. CIV. PROC. CODE § 425.16(a) (West 1992)).

174. *See* London Wright-Pegs, *The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant*, 16 U.C.L.A. ENT. L. REV. 323, 334 (2009) (placing California's Anti-SLAPP Statute in category with broadest protec-

Unlike other states, whose anti-SLAPP statutes only cover the First Amendment's right of petition, California's anti-SLAPP statute covers the First Amendment's right of free speech as well.¹⁷⁵ The result here is based on the reality that a plaintiff in California is almost always likely to succeed on the merits of the case.¹⁷⁶ Indeed, anti-SLAPP statutes were intended to prevent meritless claims; unfortunately, anti-SLAPP statutes will not be successful against right of publicity claims because most right of publicity cases are not meritless.¹⁷⁷ Despite finding that Hallmark's card was protected, the court denied the special motion to strike because Hilton demonstrated a likelihood of succeeding on the merits of her right of publicity case.¹⁷⁸

A. Should Anti-SLAPP Statutes Apply to Right of Publicity Claims?

The first major question this case raises is whether anti-SLAPP statutes should apply to right of publicity claims at all.¹⁷⁹ Plaintiffs claiming a violation of their right of publicity surely stifle First Amendment-protected free speech.¹⁸⁰ But it is questionable whether the legislature intended for the anti-SLAPP statute to be

tion of media's First Amendment rights); Tate, *supra* note 20, at 858-59 ("One consequence of California's having such a broad statute is that any individual who alleges libel, invasion of privacy, or intentional infliction of emotional distress against a newspaper, publishing, or other media company can expect to be quickly served with a special motion to strike. . ."); Braun, *supra* note 44, at 732 (describing California's anti-SLAPP statute when it was enacted as "the most ambitious and far-reaching of all the state anti-SLAPP laws").

175. See Wright-Pegs, *supra* note 175, at 334 (contrasting California's anti-SLAPP statute with those of other states).

176. See Braun, *supra* note 44, at 759 (noting after first prong of anti-SLAPP motion analysis met or conceded, "the matter will turn on points of substantive law"); Greene, *supra* note 7, at 527 (explaining relationship between expansion of right of publicity and intellectual property restriction).

177. See *White II*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting) (opining that right of publicity is now so broad that "it's now a tort for advertisers to remind the public of a celebrity").

178. See *Hilton*, 580 F.3d at 891 (holding Hilton had "some probability of prevailing on merits").

179. See *id.* at 885 (finding language of California's anti-SLAPP statute does not preclude its application to right of publicity claims); see also Segal, *supra* note 96, at 145 ("The scholars' original conception of what constituted a SLAPP suit . . . almost certainly did not include suits aimed at entertainment-oriented expression.").

180. See Paulsrude, *supra* note 10, at 418 ("The expansion of the right of publicity has raised concerns that First Amendment values . . . are in jeopardy."); Volokh, *supra* note 10, at 929 ("As a critic of the right of publicity, I wouldn't mind seeing the right of publicity eviscerated. . .").

used in right of publicity cases.¹⁸¹ One could analogize the celebrities who bring right of publicity claims to the corporate giants who file SLAPP suits, and the media often defending right of publicity claims to the public interest groups trying to exercise their first amendment rights.¹⁸² It seems that right of publicity claims are brought mostly to receive economic benefits from the use of the plaintiff's image, rather than "to dissuade or punish the exercise of First Amendment rights."¹⁸³ Unlike a plaintiff in a SLAPP suit, Hilton and other right of publicity plaintiffs aim to win the case.¹⁸⁴

The court only spends two sentences discussing whether right of publicity claims fit into the scope of California's anti-SLAPP statute.¹⁸⁵ It says that "the particular cause of action Hilton has brought is irrelevant to [their] decision."¹⁸⁶ While categorical exclusions may be uncalled for, it does not seem as though the cause of action should be "irrelevant."¹⁸⁷ Indeed, the purpose of the statute is to prevent certain types of lawsuits, namely those "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition. . . ." ¹⁸⁸ The language of the statute itself, however, makes clear that even if anti-SLAPP motions theoretically should not be allowed in right of publicity claims, they are allowed.¹⁸⁹ This is because a right of publicity case will almost al-

181. See Segal, *supra* note 96, at 640-41 (noting California's anti-SLAPP statute is used differently today than it was when originally conceived). While discussing the case in which three young males sued the production company of the film, "Borat," for using their appearance on-screen comments, Segal asked how it was "that anti-SLAPP law – which was created to protect grassroots activists from the litigious excesses of developers and corporations – ended up protecting a multinational media conglomerate from a couple of drunken fratboys in a motor home?" *Id.* at 640.

182. See Wright-Pegs, *supra* note 175, at 334 (explaining how media defendants compare and contrast to public interest groups).

183. Lafayette Morehouse, Inc., v. Chronicle Publishing Co., 44 Cal. Rptr. 2d 46, 48 (Ct. App. 1995).

184. See Tate, *supra* note 18, at 803-04 (describing purpose and resulting danger of SLAPP suits).

185. See Hilton v. Hallmark Cards, 580 F.3d 874, 885 (9th Cir. 2009) (looking to little guidance given by California Supreme Court regarding "what constitutes an issue of public interest"). Quoting *Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002), the court noted that "[n]othing in the statute itself categorically excludes any particular type of action from its operation." *Id.*

186. *Hilton*, 580 F.3d at 885. "Ordinary commercial causes of action like breaches of contract or indeed misappropriation of publicity, can be 'strategic lawsuit[s] against public participation' as much as defamation can be." *Id.*

187. See Braun, *supra* note 45 (explaining there are certain causes of action to which anti-SLAPP motions to strike usually apply).

188. CAL. CIV. PROC. CODE § 425.16(a) (West 1992).

189. See CAL. CIV. PROC. CODE §425.16(a) (noting legislature meant to construe SLAPP suits broadly).

ways arise from an act “in furtherance of the person’s. . . free speech under the United States Constitution in connection with a public issue.”¹⁹⁰ The only other cases applying California’s anti-SLAPP statute to right of publicity cases, *Browne*, *Greenstein*, *Padilla* and *Rolling Stone* made no mention of whether anti-SLAPP motions should apply to such cases.¹⁹¹

B. Which Right of Publicity Defendants Can File Anti-SLAPP Motions?

The second question raised by *Hilton* is: if California’s anti-SLAPP statute applies to right of publicity claims, can all defendants in such cases file such a motion?¹⁹² Here, Hallmark is a company trying to make money by selling greeting cards, not a small interest group trying to petition the government to prevent a particular action they disagree with.¹⁹³ While some argue that the media should not be entitled to bring anti-SLAPP motions to strike because of their power, it would seem illogical to prevent media holdings from using anti-SLAPP statutes since much of society’s public discourse occurs through media outlets.¹⁹⁴ Such public discourse is exactly what the anti-SLAPP statute was intended to protect.¹⁹⁵ Views expressed through the entertainment media are protected just like political speech, and such views are greatly discouraged by the threat of expensive and time-consuming litigation by those who are the subject of such views.¹⁹⁶

190. *Id.*

191. For a further discussion of cases applying California’s anti-SLAPP statute to right of publicity cases, see *supra* notes 116-52 and accompanying text.

192. See Braun, *supra* note 45 (explaining one question that needs to be answered is which defendants can file special motion to strike pursuant to California’s anti-SLAPP statute).

193. See Wright-Pegs, *supra* note 175, at 334-35 (describing paradigm case applying anti-SLAPP statute, involving large corporation filing SLAPP against public interest group).

194. See *id.* at 339 (responding to argument against media entitlement to anti-SLAPP statutes, namely “potential for media abuse”); Segal, *supra* note 96 (arguing expansive application of anti-SLAPP statutes is “appropriate” in light of “the contemporary media landscape and the United States’ broad conception of the First Amendment”).

195. See Tate, *supra* note 18 (explaining purpose of anti-SLAPP statute).

196. See Segal, *supra* note 96, at 646 (“[L]ike the danger posed to government petitioners, there is also the possibility that the threat of a suit could chill certain kinds of entertainment-oriented expression, making it less likely that producers will make biopics or features that intersect with reality”).

VI. IMPACT

Because California is one of the states with the highest number of right of publicity actions, *Hilton v. Hallmark* will have a large impact on right of publicity claims in the Ninth Circuit, as well as in other jurisdictions.¹⁹⁷ As a result of its expertise on right of publicity cases, other circuits look to the Ninth Circuit as an authority on such cases.¹⁹⁸ *Hilton* severs as the first Ninth Circuit case applying the California anti-SLAPP statute to a right of publicity case.¹⁹⁹ Therefore, *Hilton* will likely be relied upon as precedent by other courts and states when they experience the intersection of the right of publicity and their version of an anti-SLAPP statute. It has become clear that the right of publicity framework needs to be refined in order to prevent further impingement on defendants' First Amendment rights.²⁰⁰ But it has also become clear, after *Hilton*, that California's anti-SLAPP statute is not the cure for the right of publicity doctrine's problems.²⁰¹

Although under California's version of an anti-SLAPP statute, the defendant in a right of publicity case will be able to file a special

197. See *White II*, 989 F.2d 1512, (9th Cir. 1993) 1521 (Kozinski, J., dissenting) (noting livelihood of "cultural icons" depends on Ninth Circuit's decisions); Anastasios Kaburakis, Davis A. Pierce, Olivia M. Fleming, Galen E. Clavio, Heather J. Lawrence, & Dawn A. Dziuba, *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry: The Keller Forecast*, 27 ENT. & SPORTS LAW 1, 30 (2009) ("By far, the Ninth Circuit in California has heard the most rights of publicity cases."); Steven C. Clay, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 486 n.12 (1994) ("Because of the enormous number of celebrities living and working in California, as well as the sheer volume of entertainment produced within California, California publicity law will have a great impact on the rights of artists, entertainers, and advertisers everywhere.").

198. See P. Stephen Fardly, *Feet of Clay: How the Right of Publicity Exception Undermines Copyright Act Preemption*, 12 TEX. INTELL. PROP. L. J. 443, 454 (2004) ("[A] number of other jurisdictions have cited Ninth Circuit rulings as precedent for allowing right of publicity claims."); Michael J. Albano, *Nothing to 'Cheer' About: A Call for Reform of the Right of Publicity in Audiovisual Characters*, 90 GEO. L. J. 253, 258 (2001) ("As the jurisdictional home to Hollywood, the Ninth Circuit's decisions within this field will not only establish precedent for the numerous cases arising from the California courts, but this body of decisionmaking will also be persuasive to other state and circuit courts.").

199. For a further discussion of cases involving anti-SLAPP motions to strike in right of publicity cases, see *supra* notes 116-52 and accompanying text.

200. See Paulsrude, *supra* note 10, at 419 ("The existence of a First Amendment limitation on right of publicity claims is necessary to restrict monopolies celebrities and their heirs possess over the image of cultural icons, as well as to maintain and encourage the democratic exchange of ideas."); Volokh, *supra* note 10, at 904-05 (opposing right of publicity in general and specifically cases that fall outside the category of "core commercial advertising").

201. For a further discussion of the effectiveness of anti-SLAPP motions in right of publicity cases, see *infra* notes 173-96 and accompanying text.

motion to strike, he or she will likely fail.²⁰² This is because, as *White v. Samsung Electronics* demonstrated, a plaintiff's right of publicity applies to anything that might "evoke" his or her personality, and a plaintiff will thus have a likelihood of succeeding on the merits of his or her case.²⁰³ The effect of the decision in *Hilton* is that district courts in the Ninth Circuit, and other courts that follow Ninth Circuit right of publicity precedent, will continue to allow plaintiffs in right of publicity cases to interrupt the free expression rights to which defendants are entitled under the Constitution.²⁰⁴ Without any justification from the Ninth Circuit as to why the California anti-SLAPP statute can be used in a right of publicity case, other states may rely upon Ninth Circuit precedent, using their own anti-SLAPP statutes to decrease the number of right of publicity cases, rather than remedying the true problem – a right of publicity doctrine that has been expanded too far.²⁰⁵

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202. For a further discussion of the shortfalls of anti-SLAPP motions in right of publicity cases, see *infra* notes 173-96 and accompanying text.

203. See *White I*, 971 F.2d 1395, 1398-99 (9th Cir. 1992) (denying summary judgment in Vanna White's right of publicity claim against Samsung for misappropriation because commercial "evoked" her personality and generated issue of material fact).

204. See Volokh, *supra* note 10, at 924 ("The right of publicity . . . diminishes the range of artistic expression that people can view, as well as the range that they can create."); see also Paulsrude, *supra* note 10, at 419 ("The Ninth Circuit has certainly done its part in expanding [the right of publicity].").

205. See *White II*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting) (opining that California courts are overprotecting plaintiffs' right of publicity). Judge Kozinski warned that:

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.

Id. (citations omitted).

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