THE RIGHT OF PUBLICITY IN NEW YORK AND CALIFORNIA: A CRITICAL ANALYSIS

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I. INTRODUCTION

The right of publicity is a proprietary right, which enables celebrities to prevent or control unauthorized uses of their identity for advantage. It is recognized that there is a commercial value that attaches to celebrity status, which is often evoked through endorsement contracts for goods or services. Through endorsement, the goodwill associated with the celebrity attaches to the good or service, resulting in an elevated consumer appeal in that good or service.

Celebrities earn a significant proportion of their income from the right to enter into endorsement contracts. However, corporations commonly attempt to appropriate a celebrity's identity to obtain a commercial advantage over competitors through clever advertising strategies, without paying an endorsement fee to the celebrity. Under the right of publicity, use of a celebrity's identity in advertising or trade without his or her consent constitutes the tort of unfair competition.

California and New York, commonly viewed as the entertainment capitals of the United States, adopt strikingly different approaches to the right of publicity. New York law prevents any unauthorized uses of a celebrity's name, portrait, picture or voice for advertising or trade purposes, and does not recognize a right of publicity at common law. However, as a result of several decisions by the Ninth Circuit Court of Appeals, California recognizes a right of publicity under statute and common law, the latter preventing unauthorized uses of any identifiable aspects of a celebrity's identity.

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This paper proposes that, to prevent free-riding on the celebrity's associated commercial value, and in recognition of the economic and social importance of the entertainment industries in those two states, the current state of New York law is inadequate. Consequently, efforts should be made, either legislatively or by revisiting the common law position, to adopt the approach taken in California.

II. THE RIGHT OF PUBLICITY

The right of publicity is a personal property right to "own, protect, and profit from one's name, likeness, voice, or identity" or "to control the commercial use of his or her identity."[1] Unauthorized use of a person's identity is a tort, constituting an infringement of his or her right of publicity.[2] The right of publicity affords every person the right to assign or prevent the use of his or her identity for commercial purposes, such as endorsing a corporation's goods or services, or preventing unauthorized broadcasts of a person's act or performance.[3]

Protection of publicity rights is extended to all persons.[4] In practice, however, only celebrities posses sufficient commercial value in their identity to justify litigation.[5] In any event, appropria-

1. Aaron A Bartz, . . . *And Where it Stops, Nobody Knows: California's Expansive Publicity Rights Threaten the Federal Copyright System*, 27 SW. U. L. REV. 299, 302 (1997) (defining right to publicity); *see* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2011) (explaining commercialization of individual).

2. *See* MCCARTHY, *supra* note 1 (discussing cause of action for infringement of right of publicity); Lindsay C. Hanifan, *Paris Hilton Avoids Getting Slapped: The Application of California's Anti-Slapp Statute to a Right of Publicity Claim in* Hilton v. Hallmark Cards, 18 VILL. SPORTS & ENT. L.J. 289, 295-300 (outlining history of right of publicity).

3. *See* J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995) (describing limitations and purpose of right); *see* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578-79 (1977) (determining First and Fourteenth Amendments do not automatically privilege press to "human cannon ball" performance). However, as McCarthy noted, these cases tend to be rare. *See* McCarthy, *supra* at 133 (noting infrequency of such cases).

4. *See* McCarthy, *supra* note 3, at 134 (citing Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc., 637 F. Supp. 856, 862 (E.D. Pa 1985)) (providing authority for proposition that "right of publicity" affords protection to natural persons and "does not protect 'persona' of corporation").

5. *See* Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 854, 856-57 (1995) (discussing commercial value of celebrity personality); Sara J. Crasson, *The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque Du Soleil*, 19 VILL. SPORTS & ENT. L.J. 73, 105 (2012) ("[F]ew variety artists have approached Vanna White's level of celebrity or notoriety, so it is unlikely many would receive her level of protection" under right of publicity).

tions of a non-celebrity's identity are unlikely, due to the lack of commercial value attaching to such a person's identity.[6] For these reasons this paper will focus on the celebrity's right of publicity.

A. Right of Publicity and Free Speech

There are many ways in which a celebrity's identity may be directly or indirectly used. For example, a restaurateur may name a restaurant after a famous actor, a t-shirt manufacturer may sell t-shirts which display photographs or likenesses of a celebrity, a newspaper may sell posters commemorating an athlete's sporting performance, a car manufacturer may employ a musician to sound like a famous singer in an advertisement, or an electronics company may employ a robot in an advertisement which resembles the characteristics of a celebrity.[7]

While the right of publicity protects against unauthorized uses of identity, the right does not protect against each and every potential use. Some uses may be protected under the First Amendment right of free speech.[8] Professor Caudill identified four categories under which a celebrity's identity may be used.[9] The first category comprises advertising or trade purposes, which may include trading

6. *See* Bartz, *supra* note 1, at 300 (discussing increased interest in right of publicity due to prevalence of celebrities promoting products). An example given by Bartz involves an advertiser, or by extension, a manufacturer of goods or services, seeking to augment consumer value of its product by identifying an alignment with a celebrity through advertising. *See id.* (noting popularity of public figures in advertising market). *Cf* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 451 (N.Y. 1902) (holding individual does not have right to prohibit all distasteful publicity). In *Roberson*, the plaintiff was a non-celebrity who sought damages for the allegedly unauthorized "obtain[ing]," "print[ing]," and "circulat[ing]" of 25,000 lithographic prints of her person. *Id.* It should be noted, however, that in this case, the plaintiff was seeking protection pursuant to the Warren and Brandeis formulation of the common law right of privacy, due to the plaintiff's alleged humiliation "by the scoffs and jeers of persons," and was therefore not claiming damages for violation of her publicity rights. *Id.* at 442-43.

7. *See* McFarland v. Miller, 14 F.3d 912, 914 (3d Cir. 1994) (discussing claim against restaurant); Comedy III Prods., Inc v. Gary Saderup, Inc., 21 P.3d 797, 809 (9th Cir. 2001) (discussing claim regarding celebrity representation on T-shirts); Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 640 (9th Cir. 1995) (discussing claim against newspaper); Midler v. Ford Motor Co., 849 F.2d 460, 461-62 (9th Cir. 1988) (regarding car advertiser using musician to impersonate famous singer); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (concerning robot mimicking famous individual).

8. *See* David Tan, *Beyond Trademark Law: What the Right of Publicity can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 924-25 (2008) (finding some uses of identity protected under First Amendment).

9. *See* David S. Caudill, *Once More into the Breach: Contrasting US and Australian "Rights of Publicity"*, 9 MEDIA & ARTS L. REV. 263, 264-65 (2004) (presenting four categories of proper use of celebrity identity).

on the associative value of a celebrity, or conveying celebrity endorsement.[10] The second category includes literal or conventional representations of celebrities, such as when a celebrity is featured in a photograph, painting, or on clothing or merchandise.[11] The third category involves transformative and creative representations of celebrities.[12] The fourth category consists of use of a celebrity's identity in public interest matters, including news reporting, entertainment parody and satire, and biographies.[13]

As a general rule, the right of publicity affords a celebrity the right to prevent or control unauthorized uses of his or her identity which fall within categories one or two, but not categories three or four.[14] Where an unauthorized use of a celebrity's identity falls on the borderline, the public interest is said to prevail over the right of publicity, and whether an authorized use falls within a particular category is often a matter of judicial discretion.[15] This paper will

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10. *See id.* (providing examples of proper use of celebrity identity for advertising or trade purposes).

11. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953) (discussing proper use of photographs); *see* ETW Corp. v. Jireh Publ'g., Inc., 332 F.3d 915, 924-25 (6th Cir. 2003) (Clay, J. dissenting) (explaining paintings as proper use); *see Comedy III Productions, Inc.*, 21 P.3d at 801-02, 809 (finding clothing on merchandise proper use).

12. *See* Tan, *supra* note 8, at 925 (citing *Comedy III Productions, Inc.*, 21 P.3d at 809) (explaining relationship between transformative and creative representations and right of publicity). In California, the transformative uses test is applied to balance any conflicts between the right of publicity and free speech values. *See id.* (describing test). The transformative uses test asks "whether the depiction or imitation of the celebrity is the very sum and substance of the work in question," (in this instance, right of publicity prevails), or "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness," (in this instance, the First Amendment right to free speech prevails). *See id.* (quoting *Comedy III Productions, Inc.*, 21 P.3d at 809).

13. *See* CAL. CIV. CODE § 3344 (d) (West 1997) (regulating use of identity for public affairs). *See* Stephano v. News Grp. Publ'ns, 64 N.Y.2d 174, 184-86 (2d Cir. 1984) (discussing use of identity in news reporting). In *Stephano*, the New York Court of Appeals ordered summary judgment for the defendant on the basis that the plaintiff was unable to provide sufficient evidence "to raise a jury question as to whether the article" published did not fall within the "newsworthiness exception" to protection under sections 50 and 51 of the New York Civil Rights Law. *See id.* at 174, 184 (stating holding of case and explaining "newsworthiness exception"). *See* Matthews v. Wozencraft, 15 F.3d 432, 439 (5th Cir. 1994) (discussing use of identity in biographical work). In *Matthews*, the court held that the publication of an unauthorized biography of the plaintiff was not an infringement of the plaintiff's rights of privacy or publicity. *See id.* at 432 (providing holding of case). *See* MCCARTHY, *supra* note 1, at § 8:15 (discussing entertainment parody and satire).

14. *See* Caudill, *supra* note 9, at 264-66 (discussing categories of identity use).

15. *See* Alicia Del Valle, *The "Governator" Bobblehead – An Exploration of the Right of Publicity in California – an Interview with William T. Gallagher of Golden Gate University School of Law*, 5 U.C. DAVIS BUS. L.J. 21, 21-30 (2005) (describing recent example involving production and sale of bobblehead toys depicting California

focus on the right of publicity doctrine in New York and California without further consideration of the demarcation between the four categories. This paper will proceed on the basis that the uses discussed herein fall within either category one or two, and are *prima facie* protected, subject to the scope of protection afforded under the laws of New York and California.

B. Celebrity Identity

The right of publicity is concerned with unauthorized uses of one's identity; however, the definition of identity varies from state to state.[16] The "protectable aspects" of identity were originally restricted to names or likenesses.[17] However, protection is now afforded to a celebrity's photograph, portrait or picture, including the use of mannequins and "look-alikes."[18] Protection also extends to a celebrity's voice, including "sound-alikes," acts of entertainment, personality or style of performance, catchphrases, objects, or characters and roles synonymous with the celebrity.[19]

Governor Arnold Schwarzenegger). Such uses could fall within any of the four categories. *See id.* (noting sale of bobblehead falls within four categories). *But see* ETW Corp. v Jireh Publ'g, Inc., 332 F.3d 915, 936-37 (6th Cir. 2003) (regarding appropriate category of "use" for artistic representation of Tiger Woods).

16. *See* McCarthy, *supra* note 3, at 132 (noting that, due to nature and scope of publicity rights protection differing from state to state, advertisers who publish or broadcast advertisements nationally across U.S. should ensure that they have complied with states with broadest protection afforded to right of publicity).

17. *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 77 (Ga. 1905) (discussing historical limitations of identity protections to misappropriation of name and likeness).

18. *See, e.g.*, CAL. CIV. CODE § 3344 (West 1997) (describing publicity protection); N.Y. CIV. RIGHTS § 50-51 (McKinney 2009) (outlining publicity protection); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d. 254, 263 (N.Y App. Div. 1983) (finding plaintiff's rights were misappropriated); Allen v. Nat'l Video, Inc. & Ors, 610 F. Supp. 612, 632-33 (S.D.N.Y. 1985) ("*Woody Allen*") (ruling on motions for summary judgment).

19. *See, e.g.*, CAL. CIV. CODE § 3344 (West 1997) (noting additional publicity protection for categories); N.Y. CIV. RIGHTS § 50-51 (McKinney 2009) (describing categories of publicity protection); Midler v. Ford Motor Co., 849 F.2d 460, 464-65 (9th Cir. 1988) (holding that defendants appropriated identity of famous singer to sell defendants' product); Waits v. Frito-Lay, Inc, 978 F 2d 1093, 1093 (9th Cir. 1992) (ruling on suit of voice misappropriation under California law); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 562 (1977) (regarding videotaping of "human cannonball" act against performer's wishes); Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 661 (N.Y. App. Div. 1977) (discussing alleged misappropriation of public personality); Carson & Ors v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983) (ruling on Johnny Carson's complaint of alleged misuse of his phrase "Here's Johnny"); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825-27 (9th Cir. 1974) (affirming "legal protection [of] an individual's proprietary interest in his own identity"); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 846-47 (S.D.N.Y. 1975) (noting protection afforded to character role); Lugosi v. Universal Pictures, Inc., 603 P.2d 425, 428

Notwithstanding the aforementioned protections, New York law currently prevents unauthorized uses of a celebrity's "name, portrait, picture, or voice" for advertising or trade purposes under the New York Civil Rights Law.[20] Conversely, California's right of publicity affords protection to any identifiable aspect of a celebrity's "identity."[21] For the reasons set out herein, unauthorized uses of a celebrity's identity should not be restricted to uses of name, portrait, picture, and voice. There are many identifiable aspects of a celebrity's identity which do not fall within these four attributes—for example, famous catchphrases.[22] The narrow protection afforded under New York law enables an advertiser to obtain a commercial advantage by free-riding on the commercial value associated with a particular celebrity, without receiving the celebrity's consent or paying a fee to the celebrity. The approach taken under California law should be preferred.

III. HISTORICAL DEVELOPMENT

Interestingly, the right of publicity derived out of the right of privacy. In 1890, two lawyers, Warren and Brandeis, wrote an article entitled *The Right to Privacy*, in response to a disturbing trend involving the media publishing private information about private citizens.[23] They acknowledged that certain "sacred precincts of private and domestic life" were being invaded by instantaneous photographs and newspaper enterprise, and argued that the common law

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(Cal. 1979) (establishing protection of character name and likeness); Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317, 320 (2d Cir. 1982) (affording protection to character name and likeness); Groucho Marx Prods., Inc v. Day & Night Co., 523 F. Supp. 485, 485-90 (S.D.N.Y. 1981) (illustrating example of protection of identity); White v. Samsung Elecs. Am., Inc, 971 F.2d 1395, 1399 (9th Cir. 1992) (providing example of "likeness"); Crasson, *supra* note 5, at 103-05 (explaining how right of publicity may be used to protect performer's character).

20. *See* N.Y. CIV. RIGHTS LAW, §§ 50-51 (McKinney 2009) (defining right of privacy).

21. *See White*, 971 F.2d at 1395 (relating scope of California law regarding right of publicity).

22. *See Carson*, 698 F.2d at 831-32 (illustrating catchphrases do not fall within limited restriction). In *Carson*, the plaintiff was a famous television host of "The Tonight Show," and his identity was synonymous for the catchphrase "Here's Johnny." *See id.* (describing relevance of plaintiff's attributes). The defendant gave evidence to the court that it had used the phrase "Here's Johnny" because "the public tends to associate the words with [the] plaintiff," and "absent that identification, [the defendant] would not have [used the catchphrase]." *Id.*

23. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (responding to media publishing private information).

should recognize a right of privacy to protect every person's "right to be let alone" and "right to enjoy life."[24]

In 1902, in *Roberson v. Rochester Folding Box Co.*,[25] the plaintiff brought an action against a flour manufacturer, claiming an infringement on her right of privacy due to unauthorized printing, sale and circulation of 25,000 lithograph prints of her person.[26] The court summarized the plaintiff's complaint:

> Such publicity . . . is to the plaintiff very distasteful, and because of the defendant's impertinence in using her picture without her consent for business purposes, she has [suffered] mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture . . . .[27]

The court refused to recognize a common law right of privacy, fearful of opening the litigation floodgates.[28] *Roberson* was met with "a storm of public disapproval."[29] In 1903, the New York legislature enacted sections 50 and 51 of the New York Civil Rights Law, overruling *Roberson* and making it an offense and a tort to use a person's "name, picture or photograph" in advertising or trade without his or her consent.[30]

In 1905, and in contrast to *Roberson,* the Georgia Supreme Court expressly recognized a common law right of privacy in *Pavesich v. New England Life Insurance Co.*[31] In *Pavesich*, an insurance company used the plaintiff's name and picture without his consent,

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24. *Id.* at 193, 195.

25. 64 N.E. 442 (N.Y. 1902).

26. *See id.* at 442-43.(noting significant facts of case).

27. *Id.*

28. *See id.* at 447 ("An examination of the authorities leads us to the conclusion that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided."); *see id.* at 443 (explaining nature of right to privacy and how application of litigated principle would result in massive litigation, sometimes bordering on absurd). The court stated that a common law "right of privacy" "*cannot be confined to the restraint of the publication of a likeness.*" *Id.* (emphasis added).

29. *See* William L. Prosser, Privacy, 48 CALIF L. REV. 383, 385 (1960) (recounting reaction to court's decision in *Roberson*).

30. *See* Seth A. Dymond, *So Many Entertainers, So Little Protection: New York, the Right of Publicity, and the Need for Reciprocity*, 47 N.Y.L. SCH. L. REV. 447, 451 (2003) (describing state legislature's reaction to decision and subsequent enacting of law to remedy issue).

31. *See* Pavesich v. New England Ins. Co., 50 S.E. 68, 81 (Ga. 1905) (recognizing legal right to privacy and considering publication of individual's name and picture without consent, accompanied by false testimony, to be invasion of right).

to accompany a false testimony in advertising its life insurance products.[32] In the judgment, Justice Cobb expressed disapproval of *Roberson*, stating that the novel nature of the claim led to an "unconscious yielding to the feeling of conservatism."[33] Disagreement among state courts ensued over whether to follow *Roberson* or *Pavesich*; however, by the 1940s most agreed with *Pavesich*, recognizing a "right of privacy."[34]

A. Prosser's Four Torts of Privacy

Most early decisions considered whether or not to recognize the right of privacy, rather than determining the scope of the interests to be protected. In his article entitled *Privacy*, Professor Prosser considered that the right of privacy comprised four torts protecting different interests:

(1) Intrusion upon the plaintiff's seclusion/solitude;
(2) Public disclosure of embarrassing private facts;
(3) False light publicity; and
(4) Appropriating a plaintiff's name or likeness for commercial advantage ("the appropriation tort").[35]

Despite the appropriation tort being classified under the privacy doctrine, Prosser conceded that it protected "quite a different matter," because "[t]he interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity."[36] This was an early formulation of the right of publicity.[37]

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32. *See id.* at 79-80 (noting privacy rights infringed upon by insurance company).

33. *See id.* at 78 (warning that conservatism "should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its non-existence as a legal right.").

34. *See* McCarthy, *supra* note 1, at § 1:18 (discussing level of recognition of property rights by various states).

35. *See* Prosser, *supra* note 29, at 389 (listing four torts concerning invasion of privacy).

36. *Id.* at 406. This difference between the interests protected by Prosser's four torts was also noted by Judge Koelsch in Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 823-24 (9th Cir. 1974). Judge Koelsch noted that, while the California courts consider the gist of privacy causes of action to be compensation for injured feelings, the appropriation tort protects different interests. *See id.* (distinguishing purpose of appropriation tort).

37. *See* Eastwood v. The Superior Court of Los Angeles Cnty., 149 Cal. App. 3d 409, 416 (2d Cir. 1983) (recognizing history of common law right to privacy and related categories of invasion); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395,

B. Inadequacy of Privacy

Prosser's labeling of the appropriation tort as a subset of privacy, and his failure to specify whether it protected "injured feelings" or commercial value, resulted in confusion when celebrities began claiming violations of their privacy rights resulting from unauthorized commercial uses of their identities.[38] Nimmer discussed the inappropriateness of celebrity reliance on the right of privacy: "although the concept of privacy which Brandeis and Warren evolved fulfilled the demands of Beacon Street . . . it may seriously be doubted that [it] meets the needs of Broadway and Hollywood."[39]

Nimmer noted a number of court decisions which considered that celebrities, by virtue of their fame, had waived any rights of privacy.[40] Further, he considered that the right of privacy was designed to prevent offensive publicity; in contrast, however often a celebrity's identity was presented in a non-offensive manner, the celebrity's real grievance was damage to the "pocketbook."[41] He also observed that the right of privacy is a personal and non-assignable right, whereas the publicity value of a celebrity's identity would be severely restricted if the right to use his or her identity could not be assigned or licensed.[42]

The plight of the celebrity-plaintiff was highlighted in *Gautier v. Pro-Football, Inc.*[43] In finding no violation of the New York Civil Rights Law, Justice Desmond stated:

1397 (9th Cir. 1992) (discussing common law right of publicity); MCCARTHY, *supra* note 2, at § 1:7 (discussing common law history and right of publicity).

38. *See* MCCARTHY, *supra* note 1, at §§ 1:7, 1:23 (explaining appropriation tort and its relationship to privacy interests).

39. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203 (1954).

40. *See id.* at 204 (discussing celebrity rights of privacy).

41. *See id.* at 206-09 (noting right of privacy intended to protect against "offensive" publicity); *see* MCCARTHY, *supra* note 1, at § 1:7 (noting that celebrity's real grievance is lack of payment).

42. *See* Nimmer, *supra* note 39, at 209 (discussing source of value of celebrity's identity).

43. *See* Gautier v Pro-Football, Inc., 107 N.E.2d 485, 487 (N.Y. 1952) (discussing facts of case and contract relationship). In *Gautier*, a renowned animal trainer conducted a performance during the half time period of a professional football game before 35,000 persons, pursuant to a contract with the defendant, the owner of the Washington Redskins football team. *See id.* (stating facts of case). The contract provided that the plaintiff's act would not be televised without his prior written consent, however, it was shown as part of the telecast. *See id.* (relating terms of contract). The New York Court of Appeals held that the plaintiff was not afforded protection under sections 50 and 51 of the New York Civil Rights Law. *See id.* at 489 (holding that breach of contract did not give rise to cause of action under statute).

> My difficulty is that there was no invasion of any 'right of privacy.' [The] Plaintiff, a professional entertainer, gave his show before a vast audience in an athletic stadium. His grievance here is not the invasion of his 'privacy' – privacy is the one thing he did not want, or need, in his occupation. His real complaint . . . is that he was not paid for the telecasting of his show.[44]

C. Haelan Laboratories v. Topps Chewing Gum, Inc.

In 1953 in *Haelan Laboratories v. Topps Chewing Gum, Inc.*, the plaintiff, a chewing gum manufacturer, obtained exclusive contractual rights to use a baseball player's photograph on its chewing gum products.[45] The defendant, a rival manufacturer, induced the same player into authorizing the defendant to use his photograph on its rival products.[46] The plaintiff sued the defendant, claiming inducement of breach of contract, and was unsuccessful at trial.[47] On appeal, the defendant argued that there was no actionable wrong because the baseball player had merely agreed to release the defendant from what would otherwise be an infringement of sections 50 and 51.[48] The defendant contended that no person has a legally assignable interest in the publication of his picture.[49]

Judge Frank of the Second Circuit Court of Appeals declared the existence of a common law right of publicity, stating that "in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, for example, the right to grant the exclusive privilege of publishing his picture . . ."[50] Judge Frank recognized that the right was designed to protect the commercial interests of "prominent persons," declaring it:

> [C]ommon knowledge that many prominent persons . . . would feel deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displaying in newspapers, magazines, busses, trains and subways. This right of publicity would usually

44. *Id.* at 489.

45. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953) (illustrating rights of chewing gum manufacturer).

46. *See id.* (noting conflict of interest between competing manufacturers).

47. *See id.* at 866 (holding plaintiff did not have claim for inducement of breach of contract).

48. *See id.* at 867 (presenting defense for actions of defendant manufacturer).

49. *See id.* at 868 (discussing lack of assignable interest).

50. *Id.*

> yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[51]

Haelan has been credited with creating the right of publicity as a distinct doctrine separate from the right of privacy.[52] Judge Frank expressly recognized the different objects underlying protection of privacy and publicity values, noting the real grievance for famous persons was to affect control over unauthorized uses of their pictures, rather than to pursue compensation for "bruised feelings."[53] Further, *Haelan* declared the right, proprietary in nature, may be assigned and licensed, thereby enabling celebrities to assign their publicity rights for valuable consideration.[54]

Twenty state courts have subsequently followed *Haelan* and recognized a common law right of publicity, and eight of those states concurrently recognize a statutory right of publicity.[55] Another ten states have privacy statutes which protect publicity rights.[56] Only two states have rejected a common law right of publicity.[57] The first, Nebraska, was overruled by statute.[58] The other is New York, the very state where *Haelan* was decided.[59]

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51. *Id.*

52. *See* McCarthy, *supra* note 1, at 131 (introducing relevant right of publicity principles and origins of its distinction from right of privacy); Hanifan, *supra* note 2, at 295 ("The first case recognizing a right of publicity was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*"). *Cf.* Nimmer, *supra* note 39, at 218 (citing several cases for proposition that, before *Haelan*, there existed "judicial willingness to extend protection to publicity values" not ordinarily protected under existing doctrines).

53. *See Haelan Labs., Inc.*, 202 F.2d at 867 (clarifying goals of right of publicity).

54. *See* Nimmer, *supra* note 39, at 222 (noting that *Haelan* case held that right of publicity is "property right which may be validly assigned").

55. *See* McCarthy, *supra* note 1, at § 6:3 (noting that states that have recognized common law right of publicity are Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin). The states that recognize a statutory right of publicity are California, Florida, Illinois, Kentucky, Ohio, Pennsylvania, Texas, and Wisconsin. *See id.* (relating states which provide statutory right of publicity).

56. *See id.* (listing states as Indiana, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Virginia, and Washington).

57. *See id.* (explaining in Nebraska and New York, "a court expressly rejected the concept and held that a common law right of publicity does not exist in that state").

58. *See id.* (explaining Nebraska's stance on right of publicity); *see also* Carson v. Nat'l Bank of Commerce Trust & Sav., 501 F.2d 1082, 1085-86 (8th Cir. 1974) (rejecting right of publicity).

59. *See* McCarthy, *supra* note 1, at § 6:3 (noting New York's rejection of common law right of privacy and subsequent adoption of privacy statute).

IV. NEW YORK

Following *Haelan*, it was thought that New York law recognized a separate common law right of publicity, independent of the statutory right of privacy.[60] However, great uncertainty surrounded the precedential value of *Haelan*.[61] While the Court of Appeals for the Second Circuit and other state courts applied *Haelan*, New York state courts were inconsistent on the issue.[62] *Haelan* represented "the federal court's interpretation and application of New York law, which is . . . not binding in other jurisdictions . . . [or] New York courts."[63]

In *Lombardo v. Doyle, Dane & Bernbach, Inc.*, the plaintiff, known as "Mr. New Years Eve," sued a car manufacturer claiming unauthorized use of his "likeness and representation" in advertising.[64] The defendant employed an actor to use the same gestures, mannerisms, and music with which the plaintiff was synonymous.[65] The Appellate Division of the New York Supreme Court agreed with the plaintiff, finding a violation of his common law right of publicity.[66] The court declined protection under sections 50 and 51 because the defendant had not used his "name, portrait or picture," even though the defendant had appropriated his "personality or style of performance," which were "legitimate [protectable] proprietary interest[s]."[67] A similar result was reached in *Groucho Marx Productions, Inc., & Ors v. Day & Night Co., Inc.*[68]

In *Frosch v. Grosset & Dunlap, Inc.*, the New York Supreme Court unanimously affirmed an earlier summary judgment for the defendant, dismissing the plaintiff's right of publicity claim, because "[n]o such . . . right has yet been recognized by New York

60. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953) (recognizing right of publicity).

61. *See* Nimmer, *supra* note 39, at 222 (stating *Haelan* case provides questionable precedential weight).

62. *See id.* (contending that application of *Haelan* should be limited to its facts).

63. *Id.*

64. *See* Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 665-66 (N.Y. App. Div. 1977) (stating facts of case).

65. *See id.* (explaining purpose of defendant's actor).

66. *See id.* (explaining that celebrity has interest in his public personality, and mimicking certain aspects of celebrity's public persona could lead to exploitation of "that carefully and painstakingly built public personality").

67. *See id.* (stating court's holding).

68. *See* Groucho Marx Prods. Inc., & Ors v. Day & Night Co., Inc., 689 F.2d 317, 317 (2d Cir. 1982) (noting lower court's holding that defendants "exploited their rights of publicity" in their self-created characters and therefore those rights are properly asserted here).

State Courts."[69] Finally in *Brinkley v. Casablancas*, the plaintiff, a famous model, brought a publicity rights claim for the alleged unauthorized use of her photographs.[70] The court held that, because sections 50 and 51 do not distinguish between the private person claiming injured feelings and the celebrity whose economic interests have been exploited, ". . . the so-called right of publicity is subsumed in sections 50 and 51 of the Civil Rights Law."[71]

A. Stephano v. News Group Publications, Inc.

In 1984, in *Stephano v. News Group Publications, Inc.*,[72] the New York Court of Appeals unequivocally declared that New York does not recognize a distinct common law right of publicity.[73] In *Stephano*, the plaintiff was a model who agreed to be photographed for *New York Magazine*.[74] One photograph appeared in the August 31, 1981 issue of the magazine, and two additional photographs appeared in the September 7, 1981 issue of the magazine.[75] The plaintiff sued the defendant alleging violations of sections 50 and 51, and his common law right of publicity, because the defendant had used photographs in the August 31, 1981 issue without his consent.[76]

The court held that New York does not recognize a distinct common law right of publicity because that right is subsumed within sections 50 and 51.[77] The court noted that, although the statute was enacted to overrule *Roberson* and intended to protect

69. Frosch v. Grosset & Dunlap, Inc., 75 A.D.2d 768, 768 (N.Y. App. Div. 1980). It may be possible to distinguish *Frosch* on the basis that the claim for "right of publicity" infringement was based on a publication about the deceased, which the court deemed to be of public interest, thereby protected by the First Amendment right of free speech. *See id.* (noting extenuating circumstances of public interest). The court stated, "[t]he protection of the right of free expression is so important that we should not extend any right of publicity, if such exists, to give rise to a cause of action against the publication of a literary work about the deceased person." *Id.*

70. *See* Brinkley v. Casablancas, 80 A.D.2d 428, 429 (N.Y. App. Div. 1981) (noting that plaintiff's claim was in regard to poster bearing plaintiff's photograph).

71. *See id.* at 439 (explaining reasoning of court).

72. 64 N.Y.2d 174 (N.Y. 1984).

73. *See id.* at 183 (finding no common law right of publicity claim exists because New York Civil Rights Law encompasses right of publicity claims).

74. *See id.* at 179-80 (discussing plaintiff's profession and photography session with magazine).

75. *See id.* at 179 (discussing magazine issues that led to claim in case).

76. *See id.* at 180 (discussing plaintiff's agreement to model for only one issue).

77. *See id.* at 182-83 (addressing non-existence of common law right of publicity and existence of such right only under statute).

injured feelings, the express words of sections 50 and 51 captured any unauthorized uses of a person's "name, picture or portrait" in advertising or trade, irrespective of whether the plaintiff's grievance was commercial or not.[78]

As a result of *Stephano*, New York does not recognize a common law right of publicity; instead, New York provides only limited protection to prevent the unauthorized use of a person's "name, portrait, picture and voice" for advertising or trade purposes under sections 50 and 51 of the New York Civil Rights Law.[79] "Voice" was

78. *See id.* (citing Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443-48 (N.Y. 1902)) (discussing statutory history of right to privacy in New York and its effect on right of publicity claims).

79. *See* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009) ("A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.").

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait, picture or voice of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith; or from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith. Nothing contained in this section shall be construed to prohibit the copyright owner of a sound recording from disposing of, dealing in, licensing or selling that sound recording to any party, if the right to dispose of, deal in, license or sell such sound recording has been conferred by contract or other written document by such living person or the holder of such right. Nothing contained in the foregoing sentence shall be deemed to abro-

added to the protected list in 1995.[80]

B. Name

Some New York state and federal courts have adopted a narrow construction of "name."[81] In *Pfaudler v. Pfaudler Co.*, the Appellate Division of the New York Supreme Court held that name constitutes an individual's full name, because it is only through an individual's full name that he or she is identifiable.[82] Other cases have decided that name does not encompass a person's nickname, stagename, penname, or any unique name belonging to an unknown plaintiff.[83]

The aforementioned cases contradict judicial and academic authority that an unauthorized use of a person's name, broadly interpreted, will amount to a violation of his right of publicity, provided the plaintiff is identifiable by such name.[84] Prosser stated that "a stage or other fictitious name can be so identified with the plaintiff that he is entitled to protection against its use."[85] In *Hirsch v. S.C. Johnson & Son*, the plaintiff was a famous gridiron player whose nickname was "Crazylegs."[86] The Wisconsin Supreme Court re-

> gate or otherwise limit any rights or remedies otherwise conferred by federal law or state law.

Id. § 51.

80. *See* Dymond, *supra* note 30, at 451 (explaining various aspects of New York statute).

81. *See* McCarthy, *supra* note 1, at § 4:58 (describing various interpretations of name by state and federal courts).

82. *See* Pfaudler v. Pfaudler Co., 186 N.Y.S. 725, 726 (N.Y. App. Div. 1920) (interpreting name in reference to statute).

83. *See* McCarthy, *supra* note 1, at § 4:58 (referencing cases that interpret name to exclude nicknames); Davis v. R.K.O Pictures, 16 F. Supp. 195, 196 (S.D.N.Y. 1936) (holding "[s]ections 50 and 51 of the Civil Rights Law do not apply to any assumed or "stage name" of the plaintiff . . . [h]er only legal name is Claire H. Davis, the name she signed to the complaint, and that is the only name for which she can claim protection under the provisions of the Civil Rights Law."); Geisel v. Poynter Prods., 295 F. Supp. 331, 356 (S.D.N.Y 1968) (finding "the name 'Dr. Seuss' is an assumed name or pseudonym rather than a surname and is, therefore, not a protectable 'name' within the meaning of Section 51 of the New York Civil Rights Law."); Nebb v. Bell Syndicate, 41 F. Supp. 929, 930 (S.D.N.Y 1941) (concluding that defendant comic strip publishers who described one of their fictitious characters as "Rudy Nebb" had never heard of plaintiff Rudy Nebb who resided in Georgia, had no intention of referring to this person, and using same name as plaintiff, absent knowledge and intention, was not sufficient to violate sections 50 and 51).

84. *See* McCarthy, *supra* note 1, at § 4:58 (noting that "identifiable" requires at least minimum threshold of recognition among public who might see defendant's usage).

85. Prosser, *supra* note 29, at 404.

86. *See* Hirsch v. S.C. Johnson & Son, 280 N.W.2d 129, 130 (1979) (describing plaintiff).

manded the matter back to a jury to determine whether the defendant's use of the name Crazylegs infringed the plaintiff's right of publicity, and noted that: "[t]he fact that the name 'Crazylegs' used by Johnson, was a nickname rather than Hirsch's actual name, does not preclude a cause of action. All that is required is that the name clearly identify the wronged person . . . ."[87] Finally, the Second Circuit Court of Appeals, in the *Gardella v. Log Cabin Products Co.* ("*Aunt Jemima*"), stated in obiter that a public or stage-name may constitute a person's name if it is "closely and widely identified" with the plaintiff.[88]

C. Portrait and Picture

The interpretation of "portrait or picture" has been "somewhat flexible."[89] It is not limited to an actual photograph and can include "clearly recognizable paintings or cartoons" of a person.[90] In *Young v. Greneker Studios, Inc.*, the New York Supreme Court held that a mannequin, made in the plaintiff's likeness, may constitute a portrait or picture:

> The words 'picture' and 'portrait' are broad enough to include any representation . . . . The use of a three-dimensional representation is just as violative of the statute as that of a two-dimensional one . . . the word 'portrait' includes . . . a carved or molded figure, a statue, a sculpture, a visible representation or likeness; an image; a copy . . .[91]

The use of a "look-alike" can constitute a portrait or picture. In the *Woody Allen* case, the plaintiff, a famous actor, sued multiple parties claiming infringements of sections 50 and 51, his right of publicity, and the Lanham Act prohibition of misleading advertising, from an alleged appropriation of his face and implication of his endorsement of the defendant's products by use of a look-alike

87. *Id.* at 137.

88. *See* Gardella v. Log Cabin Prods. Co. ("*Aunt Jemima*"), 89 F.2d 891, 894 (2d Cir. 1937) (addressing protection of stage names).

89. Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1213 (1986).

90. Allen v. Nat'l Video, Inc. ("*Woody Allen*"), 610 F. Supp. 612, 622 (S.D.N.Y. 1985); *see also* Ali v. Playgirl, Inc., 447 F. Supp. 723, 726 (S.D.N.Y. 1978) (stating that "portrait or picture" extends beyond photographs to standard of "representations which are recognizable as likenesses").

91. Young v. Greneker Studios, Inc., 26 N.Y.S.2d 357, 358 (N.Y. App. Div. 1941).

actor.[92] Although the court failed to determine the look-alike issue, the court found for the plaintiff on the Lanham Act claim.[93] The court cited with approval, however, *Onassis v. Christian Dior-New York, Inc.*, for the proposition that a look-alike can constitute a portrait or picture where the "overall impression created clearly was the plaintiff had herself appeared in the advertisement."[94]

One notable, albeit questionable, limit on what constitutes a "portrait or picture" derives from the recent decision in *Burck v. Mars, Inc.*[95] The plaintiff was a street entertainer who performed in Times Square as the "Naked Cowboy," wearing only a white cowboy hat, cowboy boots and underwear, and carrying a "strategically placed" guitar.[96] The plaintiff had registered trademarks to "The Naked Cowboy" name and likeness.[97] The plaintiff sued the confectionary company, claiming infringements of his right of publicity and the Lanham Act false endorsement provisions, arising from animated advertisements playing in Times Square depicting a blue M&M dressed "*exactly like The Naked Cowboy*."[98] Judge Chin dismissed the plaintiff's privacy claim, noting that the statute protects the "name, portrait and picture of a living person," and does not protect a "character created or a role performed by a living person."[99] Judge Chin stated that, while portrait or picture can include actual photographs and "any recognizable likeness . . . no viewer would have thought that the M&M Cowboy characters were actually [the plaintiff] or were intended to be him."[100] Judge Chin also noted that merely evoking certain aspects of a character or role does not infringe sections 50 and 51.[101] Curiously, while the court acknowledged the *Woody Allen* decision, which noted that a "clearly recognizable painting or cartoon . . . drawing or [mannequin]" would certainly constitute a portrait or picture, the court found that the advertisement at issue depicted a fictional character played by

92. *See Allen*, 610 F. Supp. at 617 (relating causes of action brought by plaintiff against defendants).

93. *See id.* at 624-25 (reasoning that Lanham Act analysis properly addresses facts of case).

94. *Id.* at 623-24 (citing Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 261-62 (N.Y. Sup. Ct. 1983)).

95. *See* Burck v. Mars, Inc., 571 F. Supp. 2d 446, 458 (S.D.N.Y. 2008) (dismissing plaintiff's right to privacy claim but not false endorsement claim).

96. *See id.* at 448 (describing plaintiff's act and costume).

97. *See id.* (noting plaintiff possessed trademarks).

98. *Id.* (emphasis in original).

99. *Id.* at 448-49.

100. *Id.* at 451-52.

101. *See id.* at 452-53 (discussing sections 50 and 51 of New York Civil Rights Law).

the plaintiff, and therefore was not protected under sections 50 and 51.[102]

D. Voice

Prior to 1995, the court in *Tin Pan Apple, Inc. v. Miller Brewing Co.*,[103] held that sections 50 and 51 did not prevent misappropriations of a person's voice.[104] Following legislative amendment in 1995, protection under sections 50 and 51 was extended to unauthorized uses of a person's voice.[105] It remains to be seen, however, whether voice will encompass "sound-alikes."[106]

V. CALIFORNIA

California courts were originally hostile towards *Haelan*.[107] In 1974, with *Motschenbacher v. R.J. Reynolds Tobacco Co.*,[108] the Ninth

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102. *See id.* at 452 (quoting Allen v. Nat'l Video Inc. ("*Woody Allen*"), 610 F.Supp. 612, 624 (S.D.N.Y. 1985)) (discussing what constitutes "clearly recognizable").

103. 737 F Supp 826 (S.D.N.Y. 1990).

104. *See id.* at 837 (involving copyright infringement, false designation of origin, unfair competition claims brought by rap group against beer manufacturer).

105. *See* McCARTHY, *supra* note 1, at § 6:84 (discussing 1995 legislative amendments).

106. *See* Midler v. Ford Motor Co., 849 F 2d 460, 463 (9th Cir. 1988) (holding that California's statutory right of publicity is not violated by use of sound-alike). In *Midler*, the Ninth Circuit Court of Appeals held that, for the purposes of section 3344 of the California Civil Code, a person's right of publicity is not violated by the use of a sound-alike, although use of a sound-alike was held to violate California's expansive right of publicity at common law. *See id.* (stating that Midler did not have a claim under section 3344, but could seek damages under common law). Such a determination may be persuasive on the Second Circuit Court of Appeals in its future interpretation of sections 50 and 51 of the New York Civil Rights Law. *But see* Oliveira v. Frito-Lay, Inc, No. 96 Civ. 9289 (LAP), 1998 WL 267920, at 1637 (S.D.N.Y. Mar. 30, 1998) (discussing earlier motions). The court noted its earlier granting of the defendants' motion, in respect of the plaintiff's claim of evoking an association with plaintiff's style of voice. *See id.* at 1638 (rejecting cause of action under look-alike theory and then Civil Rights Law). There, the court noted that "[t]o the extent that the commercial may evoke an association with Gilberto or the style of Gilberto through the use of the recording of her voice, such association or evocation is not actionable under the Civil Rights Law." Oliveira v. Frito-Lay, Inc., No. 96 Civ. 9289, 1997 WL 324042, at *8 (S.D.N.Y. June 13, 1997). The author therefore considers that it may be inferred from the judgment that, had the New York Civil Rights Law previously included voice as a protectable aspect of one's identity, it may have been inclined to recognize that voice encompassed sound-alikes.

107. *See* John R. Braatz, *White v. Samsung Electronics America: The Ninth Circuit Turns a New Letter in California Right of Publicity* Law, 15 PACE L. REV. 161, 174 (1994) (explaining Ninth Circuit's position); Strickler v. Nat'l Broad. Co., 167 F Supp 68, 70 (S.D. Cal. 1958) (emphasizing court's reticence in "blaz[ing] the trail to establish in California a cause of action based upon the right of publicity.").

108. 498 F.2d 821 (9th Cir. 1974).

Circuit Court of Appeals first indicated that California would protect "an individual's proprietary interest in his own identity."[109]

In *Lugosi v. Universal Pictures*,[110] the plaintiffs alleged that the use of an image of their deceased father, an actor who played the lead role in the movie *Dracula*, was licensed without their consent, by the defendant.[111] The court found for the defendant on the basis that no post-mortem right of publicity exists; however, the court conceded that, during his lifetime, the deceased had the right to exploit his name and likeness for commercial gain.[112]

Finally, in *Eastwood v. Superior Court*,[113] the California Court of Appeals recognized a right of publicity under California's common law to prevent unauthorized uses of identity for advantage.[114] In *Eastwood*, the court held that the defendant tabloid magazine proprietor had used the plaintiff's name, photograph and likeness without his consent, to attract consumer attention, in violation of the plaintiff's common law and statutory right of publicity.[115]

A plaintiff who alleges violation of his or her common law right of publicity must establish the following four elements:

1. The alleged defendant used his or her identity;
2. The appropriation of the plaintiff's identity to the defendant's advantage;
3. The lack of consent from the plaintiff; and
4. Resulting injury.[116]

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109. *Id.* at 825. In recognizing such proprietary interests ought to be protected, the court noted various cases where "commercial aspect[s]" of one's identity have been protected either under Prosser's "appropriation tort" or a distinct right of publicity, however, the court declined to determine which approach California should adopt to protect these interests. *See id.* (discussing various cases providing protection of commercial aspects of individual's identity).

110. 603 P.2d 425 (Cal. 1979).

111. *See id.* at 427 (explaining basis for plaintiffs' cause of action).

112. *See id.* at 430-31 (characterizing right to exploit name and likeness as "personal one" that does not flow to immediate ancestors upon death).

113. 149 Cal. App. 2d 409 (Cal. Ct. App. 1983).

114. *See id.* at 417 (specifying elements required to make out cause of action for appropriation of name or likeness).

115. *See id.* at 420-21 (noting tabloid violated both statutory and common law in exploiting plaintiff's name, photograph, and likeness).

116. *See id.* at 417 (providing list of elements). *Cf* White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992) (affirming elements required to ground right of publicity cause of action). In *Eastwood*, the court held that the second element was "[t]he appropriation of the plaintiff's name or likeness for the defendant's advantage." *Eastwood*, 149 Cal. App. 2d at 417. In contrast, the court in *White* held that the right of publicity at common law is not confined to uses of one's name or likeness, but more broadly, to uses of one's identity. *White*, 971 F.2d at 1397-99. Furthermore, the second element of the right of publicity at common

The statutory right of publicity contained in section 3344 of the California Civil Code requires two additional elements:

5. Knowing use of the plaintiff's identity for advertising or solicitation of purchases; and
6. Direct connection between the use and the commercial purpose.[117]

The aspects of one's identity protectable under section 3344 are "name, voice, signature, photograph or likeness."[118] Consequently, the statutory protection afforded in California is broader than that afforded by sections 50 and 51 of the New York statute.

However, it is the protection afforded under California's right of publicity at common law which is decidedly more expansive. In *Motschenbacher*, an internationally known car racer, notorious for his cars which displayed distinctive stripes and the number "11," sued a tobacco company for unauthorized use of a photograph of the plaintiff's car, which had been altered to display the number "71" instead of "11."[119] The Ninth Circuit Court of Appeals overturned an earlier determination that the driver of car "71" was not identifiable with the plaintiff: "these markings were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was [the] plaintiff's and to infer that the person driving the car was the plaintiff."[120] Here, the plaintiff's identity was evoked by the defendant through the use of photographs of the plaintiff's distinctive racecars, which had become "signs or symbols associated with him" and synonymous with his personality.[121]

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law affords broader protection than under the statute, because the former requires appropriation of the plaintiff's identity for the defendant's "advantage," whether commercial or otherwise, whereas section 3344(a) requires appropriation for commercial purposes only, that is, for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services. *See id.* (discussing scope of common law).

117. *See Eastwood*, 149 Cal. App. at 417 (presenting additional elements of statutory right to privacy); *see also* CAL. CIV. CODE § 3344(a) (West 1997) (explaining knowledge requirement); CAL. CIV. CODE § 3344(e) (West 1997) (requiring commercial use to be actionable).

118. CAL. CIV. CODE § 3344(a) (West 1997). *See also* CAL. CIV. CODE §3344(b) (West 1997) ("'[P]hotograph' means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.").

119. *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822 (9th Cir. 1974) (relating facts of case).

120. *Id.* at 827.

121. *Id.*

The case of *Midler v. Ford Motor Co.*[122] involved a plaintiff who was a famous actress and singer with many successful songs, including "Do You Want to Dance."[123] The defendant contacted the plaintiff's agent and proposed that the plaintiff appear in the defendant's commercial, but the plaintiff's agent declined.[124] Subsequently, another musician was employed to sing "Do You Want To Dance" in the commercial with instructions to "sound as much as possible like . . . Bette Midler."[125] The plaintiff claimed that section 3344 and her common law right of publicity had been infringed.[126] The Ninth Circuit Court of Appeals held that, while section 3344 did not provide any protection to the plaintiff because her voice was not used in the commercial, the defendants used a sound-alike to "convey the impression that Midler was singing for them," and "[a] voice is distinctive and more personal than the automobile accouterments protected in *Motschenbacher* . . . [and] as distinctive and personal as a face."[127] The court held that the defendants impersonated the plaintiff's voice to "pirate her identity" to their advantage and therefore infringed her common law right of publicity.[128] The decision in *Midler* was approved and followed in *Waits v. Frito-Lay, Inc.*,[129] where the Ninth Circuit Court of Appeals upheld an earlier jury verdict in the plaintiff's favor.[130] There, the defendant's radio commercial featured a vocal performer imitating the plaintiff's distinctively raspy singing voice.[131]

Finally the decision in *White v. Samsung Electronics America* was said to have "greatly expanded the scope of California's common law right of publicity . . . where both the bench and bar will be unsure of its boundaries."[132] The plaintiff in that case was the female hostess of "Wheel of Fortune," a game show which boasted

122. 849 F.2d 460 (9th Cir. 1988).

123. *See id.* at 461 (discussing identity of plaintiff).

124. *See id.* (recounting request made by defendant to plaintiff, which plaintiff refused).

125. *Id.*

126. *See id.* at 463 (recounting plaintiff's cause of action).

127. *Id.*

128. *Id.*

129. 978 F.2d 1093 (9th Cir. 1992).

130. *See id.* 1112 (upholding jury verdict and holding voice misappropriation and Lanham Act claims to be legally sufficient).

131. *See id.* at 1097 (noting plaintiff's unique raspy voice recognized by fans). The advertising agency that created the commercial for the defendant chose one of the plaintiff's songs and searched for a singer to imitate his voice. *See id.* (discussing defendant's apprehension to release commercial in fear of potential legal repercussions).

132. Braatz, *supra* note 107, at 163, 221.

forty million daily viewers.[133] The plaintiff had blonde hair, and wore distinctively large jewelry and a long gown.[134] The defendant featured a robot in its television commercial, in which the robot donned a blond wig, gown and jewelry, posing in front of a "Wheel of Fortune" style game board with a caption reading "longest-running game show."[135] The plaintiff alleged infringements of her statutory and common law right of publicity, and false endorsement under the Lanham Act.[136] The Ninth Circuit Court of Appeals upheld the grant of summary judgment to the defendant on the section 3344 claim, but found that the District Court erred in granting the defendant's summary judgment on the other two grounds.[137] The court held that *how* one's identity was misappropriated is not as important as *whether* it had been misappropriated.[138] In an analysis which has received some criticism, the court recognized that an appropriation of one's identity can occur, not only when there is an actual use of identity, but when a celebrity's identity has been evoked: "[t]he identities of the most popular celebrities are not only the most attractive for advertisers, but *also the easiest to evoke without resorting to obvious means such as name, likeness, or voice.*"[139] In declaring such expansive publicity rights protection, the court noted that a right of publicity which guards against a "laundry list of specific means of appropriating identity" encourages the "clever advertising strategist" to be inventive in appropriating a celebrity's identity.[140]

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133. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992) (discussing popularity of plaintiff's game show).

134. *See Vanna Style*, SONY PICTURES, http://www.vannastyle.com/ (last visited Apr. 4, 2012) (displaying plaintiff's physical features and weekly show attire).

135. *White*, 971 F.2d at 1396.

136. *See id.* (reciting plaintiff's claims).

137. *See id.* at 1397, 1399, 1401 (holding robot at issue was not plaintiff's likeness, but plaintiff had potential right of publicity and Lanham Act claims).

138. *See id.* at 1398 (concluding right of publicity does not require misappropriation to be accomplished though particular means, only that specific means show whether defendant actually appropriated plaintiff's identity).

139. *Id.* at 1399 (emphasis added). Judge Kozinski of the Ninth Circuit Court of Appeals criticized the *White* decision, stating that it "erects a property right of remarkable and dangerous breadth . . . it's now a tort for advertisers to *remind* the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind." White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1514 (9th Cir. 1993) (emphasis in original).

140. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992).

VI. JUSTIFICATIONS FOR PROTECTION

To evaluate the different approaches taken in California and New York, the key justifications for the right of publicity should be examined.

A. Locke Labor Theory

The Locke Labor Theory posits that every celebrity achieved his or her fame through hard labor, time, and effort and is therefore entitled to the fruits of his or her labor.[141] "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Persona. This no Body has any Right to But himself."[142] In *Zacchini v. Scripps-Howard Broadcasting Co.*, the United States Supreme Court affirmed the existence of Ohio's common law right of publicity, emphasizing the "right of the individual to reap the reward of his endeavors."[143] In *Lombardo*, the court acknowledged the plaintiff's proprietary interest in his persona because "[he had] invested 40 years in developing his personality as Mr. New Years Eve."[144] Likewise, Chief Justice Bird in *Lugosi* recognized that "[y]ears of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return."[145]

The theory assumes that any commercial value associated with a celebrity's identity results from that person's labor. There is no doubt that various celebrities have contributed significantly to their "star power." Bette Midler won three Grammy Awards and was nominated for two Academy Awards in recognition of her singing and acting talents.[146] Frank Sinatra won numerous Academy Awards, Golden Globes and Emmy Awards, while Elvis Presley won three Grammys and sold approximately one billion records world-

141. *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 175 (1993) (connecting theories of John Locke to publicity right jurisprudence); *see also* Tan, *supra* note 8, at 928-32 (2008) (discussing general applicability of Lockean theory).

142. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 27 (Peter Laslett ed., Cambridge Univ. Press 1964) (1690).

143. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (analyzing individual's right to prevent unauthorized broadcasts of individual's act or performance).

144. Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 662 (N.Y. App. Div. 1977).

145. Lugosi v. Universal Pictures, 603 P.2d 425, 438 (Cal. 1979).

146. *See* Sinead Garvan, *Bette Midler: I Wouldn't Make It Now*, BBC (Nov. 26, 2010), http://www.bbc.co.uk/news/entertainment-arts-11842187 (relating interview with Bette Midler).

wide.[147] Michael Jordan and Joe Montana undoubtedly derive their star power from leading their respective teams to numerous championships with MVP performances.[148]

While the courts have long recognized the commercial value that attaches to a celebrity's identity, some have questioned whether such value results from a celebrity's labor, and thus whether he or she is entitled to reap the rewards.[149] The Locke Labor Theory ignores the influence of various sectors in contributing to, fostering, and cultivating "celebrity personality."[150] Once upon a time, individuals became famous through feats of excellence: A man's name was not apt to become a household word unless he exemplified greatness in some way or another. He might be a Napoleon, great in power, a J.P. Morgan, great in wealth, a St. Francis, great in virtue, or a Bluebeard, great in evil.[151] Presently it is naïve to suggest that celebrity fame derives solely from one's own labor. Fame can result from "luck, serendipitous involvement in public affairs, or criminal conduct," and participation in reality tele-

147. *See Frank Sinatra's Awards & Achievements*, SINATRA.COM, http://www.sinatra.com/content/frank-sinatras-awards-achievements (last visited Apr. 4, 2012) (listing awards and achievements of Frank Sinatra); *Overview of Achievements*, ELVIS.COM, http://www.elvis.com/about-the-king/achievements.aspx (last visited Apr. 4, 2012) (discussing awards and achievements of Elvis Presley).

148. *See Praise From his Peers: NBA's 50 Greatest Sing MJ's Praises*, SPORTS ILLUSTRATED (Feb. 1, 1999), http://sportsillustrated.cnn.com/basketball/nba/1999/jordan_retires/news/1999/01/13/jordan_greatest/ (listing comments by various athletes and sports analysts praising Michael Jordan's career); *Top 10 Clutch Quarterbacks of All Time*, SI.COM, http://sportsillustrated.cnn.com/multimedia/photo_gallery/0608/gallery.NFLclutchqbs/content.10.html (last visited Apr. 4, 2012) (providing photograph of Joe Montana and summary of his career). Michael Jordan is a six-time NBA championship player and a six time finals MVP winner. *See Encyclopedia Playoff Edition*, NBA.COM, http://www.nba.com/history/players/jordan_bio.html (last visited Apr. 4, 2012) (discussing Michael Jordan's career). Joe Montana is a four-time Super Bowl champion and a three-time Super Bowl MVP winner. *See Joe Montana*, PROFOOTBALLHOF.COM, http://www.profootballhof.com/hof/member.aspx?player_id=154 (last visited Apr. 4, 2012) (discussing Joe Montana's career).

149. *See* Madow, *supra* note 141, at 160-62 (discussing relationship between celebrities and their fans); Tan, *supra* note 8, at 931 ("It is obvious that the courts recognize that the identity of a celebrity can have a significant economic value that ought to be protected.").

150. *See* Rosina Zapparoni, *Propertising Identity: Understanding the United States' Right of Publicity and Its Implications – Some Lessons for Australia*, 28 MELB. U. L. REV. 690, 719-20 (2004) (deconstructing Lockean Labor Theory).

151. DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 46 (1961).

vision shows.[152] A celebrity is simply a "person who is known for his well-knownness."[153]

While Sinatra, Elvis, and Jordan may have strong claims to publicity rights protection based on Locke Labor Theory, it is difficult to mount "feats of excellence" arguments in favor of, for example, Kim Kardashian or Nicole "Snooki" Polizzi, both of whom substantially derive their fame from reality television shows.[154] Likewise Paris Hilton, once described as a "well-bred daughter of the Hollywood Hills famous for, well, who knows really . . ."[155] The cases of Kardashian, Snooki, and Hilton can be better explained by Tan.[156] Tan considered that celebrity personality is formulated, fostered, and cultivated by a trinity of persons: the celebrity, the general population, responsible for conferring fame, recognition, endorsement and goodwill on the celebrity, and celebrity "producers," including advertising agencies, brand consultants, talent management and public relations firms.[157] The value of such producers was noted by Boorstin: Shakespeare . . . divided great men into three classes: those born great, those who achieved greatness, and those who had greatness thrust upon them. It never occurred to him to mention those who hired public relations experts and press secretaries to make themselves look great.[158] Lord Hoffmann recently acknowledged the role played by producers:

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152. Fred M. Weiler, The *Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L. J. 223, 241 (1994).

153. *See* BOORSTIN, *supra* note 151, at 57 (defining celebrity).

154. *See About Me*, NICOLE SNOOKI POLIZZI, http://www.snookinicole.com/Snooki/ABOUT.html (last visited Apr. 4, 2012) (discussing Snooki's background); *see also Kim Kardashian Bio*, KIM KARDASHIAN, http://kimkardashian.celebuzz.com/bio/ (last visited Apr. 4, 2012) (recounting Kim Kardashian's personal and professional background). Interestingly Kim Kardashian initiated proceedings against Old Navy, a clothing company, alleging a violation of her publicity rights through the use of a look-alike in its advertisements, and she evoked Locke Labor Theory justifications in support of her claim; she asserted that she has "invested substantial time, energy, finances and entrepreneurial effort in developing her considerable professional and commercial achievements and success, as well as in developing her popularity, fame and prominence in the public eye." Anthony McCartney, *Kim Kardashian Sues Old Navy Over Lookalike In Ads*, USA TODAY (Jul. 21, 2011), *available at* http://www.usatoday.com/money/advertising/2011-07-21-kim-kardashian-old-navy_n.htm.

155. *See* Laura Streib, *The 10 Highest-Earning Reality Stars*, DAILY BEAST (Dec 5, 2010), http://www.thedailybeast.com/articles/2010/12/06/the-10-highest-earning-reality-television-stars.html (discussing Paris Hilton's background); *see generally* Hanifan, *supra* note 2 (explaining Paris Hilton's suit against Hallmark alleging a violation of her right of publicity because Hallmark used the slogan, "That's Hot").

156. *See* Tan, *supra* note 8, at 916-17 (explaining phenomenon of fame).

157. *See id.* (outlining parts of "trinity").

158. BOORSTIN, *supra* note 151, at 45.

> Naomi Campbell is a famous fashion model who lives by publicity. What she has to sell is herself: her public appearance and her personality. She employs public relations agents to present her personal life to the media in the best possible light just as she employs professionals to advise her on dress and make-up.[159]

Furthermore, the courts have recognized the significant role the public plays in fostering celebrity status, by recognizing and attributing good will to a celebrity.[160] Decker noted that fame is a "relational phenomenon" which correlates "in large part to the audience's needs, interests, and purposes. A person's talents alone cannot make her famous . . . ."[161] If one accepts that celebrity status derives from the trinity of persons, it follows that Locke Labor Theory, as a justification for protecting publicity rights, is unconvincing and fails to yield persuasive reasoning.

B. Economic Incentive

Another commonly cited justification is the "economic incentive" rationale, which underpins copyright, trademark, and patent law. This rationale states that affording protection to publicity rights induces and encourages people to invest time, effort, and resources to produce works or products that benefit society.[162]

Ricketson and Richardson noted the *Report on Intellectual and Industrial Property* prepared by the Economic Council of Canada, which provided that "[patents, copyrights, trademarks and registered industrial designs] are . . . incentive devices, designed to elicit more of certain kinds of 'learning' or knowledge creation and certain kinds of knowledge processing."[163] When applied to the right of publicity, Chief Justice Bird in *Lugosi* stated that: "[p]roviding

159. *See* Campbell v. MGN Ltd., [2004] UKHL 22, [37] (appeal taken from Eng.) (discussing producer's importance in context of Naomi Campbell).

160. *See* Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970) (discussing importance of public perception in creating celebrity status). The United States District Court for the District of Minnesota noted that a celebrity's name is "commercially valuable as an endorsement of a product or for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality." *Id.*

161. Michael Decker, *Goodbye Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, 27 CARDOZO ARTS & ENT. L.J. 243, 258 (2009) (discussing multiple factors involved in development of fame).

162. *See* Madow, *supra* note 141, at 206 (setting forth principles of economic incentive argument).

163. SAM RICKETSON & MEGAN RICHARDSON, INTELLECTUAL PROPERTY: CASES, MATERIALS AND COMMENTARY 11 (3d ed., 2005) (citing ECONOMIC COUNCIL OF CANADA, REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY 31 (1971)).

legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition . . . ."[164] In *Zacchini*, the court acknowledged that Ohio's right of publicity "provides an economic incentive . . . to make the investment required to produce a performance of interest to the public."[165]

There is no doubt that the financial benefits associated with celebrity status can be substantial. For example, in the early 1990s, then-NBA rookie Allen Iverson signed a fifty million dollar endorsement contract with Reebok, compared with his three-year 9.2 million dollar playing contract, and NBA star Grant Hill signed an eighty million dollar endorsement contract with Fila, to accompany his forty-five million dollar playing contract.[166] In 2003, then-high school basketball player LeBron James, yet to play an NBA game, signed an endorsement contract with Nike worth ninety million dollars.[167]

Despite the aforementioned figures, numerous commentators question whether the right of publicity will lead to a public benefit from increased creativity or accomplishments in entertainment or sport.[168] Clay argued that the economic incentive rationale wrongfully presumes that the "carrot" of the endorsement contract provides incentive for sporting or entertainment greatness.[169] The economic incentive rationale "completely ignore[s] the primary rewards gained by one who has become famous and to set up the collateral rewards as the primary motivation."[170] Madow supports

164. Lugosi v. Universal Pictures, Inc, 603 P.2d 425, 441 (Cal. 1979) (discussing economic value of one's identity).

165. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (noting economic incentive associated with right of publicity).

166. *See* GARY WAY, FEET FIRST: THE ANATOMY OF AN ATHLETIC SHOE ENDORSEMENT DEAL, IN FOOTBALL: RISING TO THE CHALLENGE 311-13 (Geoffrey Scott ed., 2006)) (relating substantial athletic-shoe endorsement contracts of NBA players).

167. *See* Seth Stevenson, *Heir Jordon: Will Nike's $90 Million Gamble Pay Off?*, SLATE (May 22, 2003, 5:18 PM), http://www.slate.com/id/2083478/ (detailing amount of LeBron James's endorsement deal with Nike).

168. *See* Steven C. Clay, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 505-06 (1994-95) (arguing against economic incentive presumption that endorsements provide incentive for athletic greatness); Tan, *supra* note 8, at 934 (recognizing considerable support for economic incentive for enterprise, creativity, and achievement from right of publicity); *see also* Madow, *supra* note 141, at 207-13 (arguing that economic incentive effect of right of publicity is very slight).

169. *See* Clay, *supra* note 168, at 505-06 (holding that Economic Incentive argument fails in real world).

170. *Id.* at 505.

this view, noting that the primary activities that create fame, including starring in a movie or playing professional sport, provide substantial payoffs: "will Quarterback Brown give up professional football and his multimillion dollar salary if others are free to use his picture on posters or T-shirts without paying him for the privilege? Not likely."[171]

Moreover, the right of publicity originated at a time when entertainers and sporting athletes were poorly paid for their trades and therefore, "a desire to maintain incentives for creativity might easily have justified a right of publicity."[172] This is no longer the case. For example, the stars of hit reality television show, "Jersey Shore," receive $100,000 per episode.[173] It goes without saying that this represents a significant pay packet for eight otherwise ordinary people, whose famed exploits include working out at the gym, tanning, and doing laundry ("GTL") by day, and excessive drinking and clubbing by night.[174] Therefore, while the right of publicity was arguably justified under the economic incentive rationale when financial rewards for sporting or entertainment endeavors were trivial, it is not persuasive in the modern era where financial rewards for sporting or entertainment activities are significant in and of themselves.

C. Unjust Enrichment

The third, and most compelling, justification in favor of the right of publicity is the "unjust enrichment" rationale. This rationale has been described as: "the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay."[175] This rationale proclaims that it is morally reprehensi-

171. Madow, *supra* note 141, at 209-10.

172. Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 138 BYU L. REV. 597, 625 (1992).

173. *See Jersey Shore Stars Secure $100,000 an Episode*, HERALD SUN (Apr. 11, 2011, 1:19 PM), http://www.heraldsun.com.au/entertainment/tv-radio/jersey-shore-stars-100000-an-episode-deal/story-e6frf9ho-1226037215025 (explaining cast members of show "Jersey Shore" earn $100,000 per episode).

174. *See Carry on Camping: The Jersey Shore Cast Leave GTL Behind To Embrace The Great Outdoors*, DAILY MAIL (July 29, 2011, 9:22 AM), http://www.dailymail.co.uk/tvshowbiz/article-2019993/The-Jersey-Shore-cast-leave-GTL-embrace-great-outdoors-camping-trip.html (detailing cast's routine behaviors during most recent season of "Jersey Shore").

175. *See* Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966) (citing "unjust enrichment" as compelling justification for right of publicity).

ble for a defendant to exploit for advantage the commercial value associated with a celebrity, when the defendant played no role in contributing to the creation of such value.[176] In *Onassis*, Justice Greenfield relied on the unjust enrichment justification when stating, "there is no free ride. The commercial hitchhiker seeking to travel on the fame of another will have to learn to pay the fare or stand on his own two feet."[177] Similarly, Judge Noonan, in *Midler*, cited with approval the comments contained in the earlier judgment of the district court, where the court described the defendants' conduct, in hiring a Bette Midler sound-alike, as akin to the "average thief," noting that "if [they] can't buy it, [they will] take it."[178]

However, similar to Locke Labor Theory, the unjust enrichment justification tends to imply that the celebrity is responsible for the creation of his or her own commercial value, downplaying the role played by the trinity of persons.[179] Such criticisms were considered and persuasively dismissed by Halpern.[180] Halpern noted that, irrespective of who is ultimately responsible for producing a celebrity's "economically exploitable fame," the existence of such value is undeniable:

> The phenomenon of celebrity generates commercial value. A celebrity's persona confers an associative value, or economic impact, upon the marketability of a product. Whether we like commercialization of personality or not, the economic reality persists. Consumers are prepared to pay for Elvis Presley tee shirts; they pay for a Presley likeness, not simply for a garment. In that sense the Presley persona's 'value' is demonstrably present, irrespective of whether a court determines that the vendor must or need not pay the Presley estate [for the right to use Presley's image].[181]

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176. *See* Tan, *supra* note 8, at 932 (explaining thrust of unjust enrichment rationale when defendant attempts to exploit commercial value associated with celebrity).

177. Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 261 (N.Y. App. Div. 1984).

178. Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).

179. *See* Decker, *supra* note 161, at 260 (illustrating that celebrity is responsible for creation of celebrity's own commercial value under unjust enrichment justification); Tan, *supra* note 8, at 934-35 (highlighting idea that celebrity is responsible for celebrity's own commercial value).

180. *See* Halpern, *supra* note 5, at 871-72 (explaining Halpern's rejection of criticisms of unjust enrichment rationale).

181. Halpern, *supra* note 89, at 1243.

In *Midler*, the court emphatically noted the commercial value associated with Midler's identity, of which the defendants attempted to take advantage:

> Why did the defendants ask Midler to sing if her voice was not of value to them? Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them? What they sought was an attribute of Midler's identity. Its value was what the market would have paid for Midler to have sung the commercial in person.[182]

Halpern argued that, if one accepts that a celebrity's identity carries with it a commercial value, the appropriate question is not whether the celebrity "deserves the benefits of celebrity," but rather whose interests should be protected; the celebrity who contributed *something* to the creation of his or her own fame, or the defendant who contributed *nothing* to the celebrity's fame and who seeks to exploit such value to its own advantage.[183] In this scenario, the defendant is properly seen as a "scavenger trading on the ephemera of fame."[184]

The use of celebrity identity acts to transfer the associative value of the celebrity's identity to the product being sold, thereby attaching that celebrity's good will to that product. This is a valuable right for which consideration should be paid, and absent consideration, compensation through right of publicity protection.

For the aforementioned reasons, the unjust enrichment rationale persuasively supports an expansive right of publicity to prevent free-riding, thereby focusing on the behavior of the defendant. This view was shared by Tan: "[t]he proper inquiry should be focused on whether the predominant purpose of the defendant is to exploit the economic associative value of the celebrity without paying an appropriate fee."[185] If the preceding arguments are accepted, it follows that New York's right of publicity protection is inadequate and the Californian approach should be preferred.

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182. *Midler*, 849 F.2d at 463.

183. *See* Halpern, *supra* note 5, at 871-72 (noting celebrity is not sole creator of his or her image).

184. *Id.*

185. Tan, *supra* note 8, at 982.

D. The Entertainment Industry

A further justification in support of a strong right of publicity derives from the economic and social importance of the entertainment industries to the states of New York and California.[186] As Dymond stated, New York and California are synonymous with entertainment: "New York [is] home to Broadway, Carnegie Hall and Radio City Music Hall. California [is] home to Hollywood and the Walk of Fame . . . [California and New York] comprise the entertainment capitals of the United States."[187]

With respect to New York, the entertainment industry is "an integral part of [its] economy."[188] It helps to create jobs for local workers, generates commerce for local businesses, contributes to local and state taxes, and affects the level of tourism and investment.[189] In 2005, the arts industry contributed $25.7 billion to New York's economy, generated 194,000 jobs, $9.8 billion in wages, and $1.2 billion in New York state taxes.[190] Of those figures, the motion picture and television industry was responsible for contributing $8.4 billion, generating 58,000 jobs, $3.7 billion in wages, and $359 million in state taxes.[191] By 2010, New York's motion picture and television industry had experienced considerable growth, generating 86,768 jobs and $7.7 billion in wages.[192] During the 2009 to 2010 financial year, 279 films and 345 TV projects were filmed in

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186. *See* Dymond, *supra* note 30, at 474 (describing importance of entertainment industries to New York and California)

187. *Id.* at 447.

188. *See* Rosemary Scanlon & Catherine Lanier, *Arts as an Industry: Their Economic Impact on New York City and New York State*, ALLIANCE FOR THE ARTS, 5 (2006) *available at* http://www.allianceforarts.org/get-the-facts/current-reports.php [hereinafter Alliance for the Arts] (describing economic role art industry plays in City and State of New York).

189. *See id.* ("The arts invest in local economies by hiring a local workforce, engaging local businesses and paying local and state taxes. Beyond that contribution . . . arts-motivated visitors [is] one of the strongest components of New York's growing tourism market.").

190. *See id.* at 7-8 (comprising motion picture and television sector, art galleries and auction houses, commercial theatre, arts-motivated visitors, and nonprofit culture). The author notes that this report does not take into consideration the economic impact of the sports industry, which may be considered part of a broader "entertainment" industry.

191. *See id.* at 13 (describing impact of film and television industries on New York State's economy in 2005).

192. *See State-by-State Film & Television Economic Contribution*, MOTION PICTURE ASS'N OF AM., http://www.mpaa.org/policy/state-by-state (last visited Apr. 4, 2012) (detailing impact of industry on New York, recent productions there, and production incentives offered by state).

New York.[193] In addition to the motion picture industry, the commercial theatre industry, including Broadway and off-Broadway productions, contributed $2.2 billion to New York's economy, created 15,450 jobs, paid $815 million in wages, and generated $79 million in taxes.[194]

California's motion picture and television industry also contributes significantly to the state's economy.[195] In 2010, it was responsible for generating 193,220 jobs, including actors, producers, writers, and directors, as well as "ancillary services" such as hairdressers and make-up artists, lighting, sound, and camera crews and caterers, and $16 billion in wages.[196] In 2010, 273 films and 254 TV series were filmed in California.[197]

In addition to the aforementioned economic impact, a large number of entertainers reside within New York and California.[198] In 2003, Los Angeles was home to approximately 44,500 entertainers, while New York City had approximately 38,900 resident entertainers.[199] As Judge Nelson noted in *Sinatra v. National Enquirer, Inc.*,[200] "California has an overriding interest in safeguarding its citizens from the diminution in value of their names and likenesses, enhanced by California's status as the center of the entertainment

193. *See id.* (noting total numbers of recent film and television projects filmed in New York).

194. *See* Alliance for the Arts, *supra* note 188, at 17 (explaining economic effects of commercial theater on New York State in 2005).

195. *See* Kevin Klowden, Anusuya Chatterjee, & Candice Flor Hynek, *Film Flight: Lost Production and Its Economic Impact on California*, MILKEN INST., 7 (Jul. 2010), *available at* http://software.intel.com/en-us/blogs/wordpress/wp-content/uploads/2010/08/FilmFlight52.pdf (emphasizing profound economic impact of entertainment industry, and film and television industries in particular, on California).

196. *See id.* (listing wide variety of careers film and television industries support); *State-by-State Film & Television Economic Contribution*, MOTION PICTURE ASS'N OF AM., http://www.mpaa.org/policy/state-by-state (last visited Apr. 15, 2012) (stating job and wage numbers for motion picture and television industries, covering production and distribution sides).

197. *See State-by-State Film & Television Economic Contribution*, MOTION PICTURE ASS'N OF AM., http://www.mpaa.org/policy/state-by-state (last visited Apr. 15, 2012) (enumerating key projects that began filming in state in 2010).

198. *See* Dymond, *supra* note 30, at 472 (comparing number of entertainers in Los Angeles and New York City, nationally number one and two respectively, to number in smaller city); *see also State-by-State Film & Television Economic Contribution*, MOTION PICTURE ASS'N OF AM., http://www.mpaa.org/policy/state-by-state (last visited Apr. 4, 2012) (showing entertainment job statistics for all states and disproportionate amount in New York and California).

199. *See* Dymond, *supra* note 30, at 472 (totaling number of resident entertainers based on membership in largest union and guild locals).

200. 854 F. 2d 1191 (9th Cir. 1988).

industry."[201] Given the economic impact of the entertainment industries on the state economies of New York and California, and the fact that right of publicity actions are ordinarily filed in the state where the celebrity resides, there are weighty justifications in favor of each state affording strong protection to celebrities, and their publicity rights, to encourage and foster further growth and development of the respective entertainment industries.[202]

E. Summary on Justifications

While the Locke Labor Theory and economic incentive rationale lack persuasive reasoning, the unjust enrichment rationale, combined with the economic importance of the entertainment industries in New York and California, provide compelling arguments justifying expansive protection of the right of publicity. For these reasons, the broad protection afforded under California's right of publicity should be preferred to the limited protection offered in New York.

VII. CRITIQUE

New York law occupies a "unique and special case in the history of the common law right of publicity," because the right originated out of the jurisprudence of the Second Circuit Court of Appeals; however, it received a "hostile reception" and eventual rejection by the court in *Stephano*.[203] New York does not recognize a common law right of publicity, and provides limited protection against unauthorized uses of a person's "name, portrait, picture and voice" for advertising or trade purposes provided under sections 50 and 51 of

201. *Id.* at 1202.

202. *See* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1518 (9th Cir. 1993) (Kozinski, J., dissenting) ("A right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity domiciled in that state. If a Wyoming resident creates an ad that features a California domiciliary's name or likeness, he'll be subject to California right of publicity law even if he's careful to keep the ad from being shown in California."). *See also* Bartz, *supra* note 1, at 303 (noting "a right of publicity action is properly filed in the state where the celebrity resides"); *Groucho-Marx Prods., Inc. v. Day & Night Co., Inc.*, 523 F. Supp. 485, 487 (2d Cir. 1985) (holding that issue of which state's law governs dispute was decided, in part, due to all defendants being resident of New York). *Cf.* Hoepker v. Kruger, 200 F. Supp. 2d 340, 348 (S.D.N.Y. 2002) (noting that protection under Civil Rights Law is afforded to both residents and non-residents of New York state).

203. *See* MCCARTHY, *supra* note 1, at § 6:74 (describing basis for New York's rejection of common law right of publicity); Stephano v. News Group Publ'ns., 64 N.Y.2d 174, 183, 182-83 (2d Cir. 1984) (rejecting outright "independent common-law right of publicity" in New York). For further discussion of *Stephano*, *see supra* notes 72-80 and accompanying text.

New York's privacy statute.[204] However, as the court noted in *Onassis*:

> There are many aspects of identity. A person may be known not only by objective indicia – name, face, and social security number, but by other characteristics as well – voice, movement, style, coiffure, typical phrases, as well as by his or her history and accomplishments. Thus far, the legislature has accorded protection only to those aspects of identity embodied in name and face.[205]

Many unauthorized appropriations of identity are deemed lawful under sections 50 and 51.[206] In *Lombardo*, the court held that the defendant had not used the plaintiff's "name, portrait or picture," but determined that it had nonetheless appropriated his "personality or style of performance."[207] As the law currently stands, these aspects of identity are not protectable in New York, because they do not fall within the exhaustive list contained in sections 50 and 51. Moreover, the misappropriation of identity considered in *Carson & Ors v. Here's Johnny Portable Toilets*[208] would not infringe sections 50 and 51.[209] In *Carson*, the plaintiff was a famous host of "The Tonight Show," synonymous with the introduction "Here's Johnny."[210] He sued the defendant, a corporation who engaged in trade and commerce as a supplier of "Here's Johnny" portable toilets, claiming unfair competition, trademark infringement and invasion of his privacy and publicity rights.[211] The defendant's president admitted to the court that he had used the phrase "Here's Johnny," because "the public tends to associate the words . . . with [the] plaintiff," and "absent that identification, he would

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204. *See* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009); *see also* MCCARTHY, *supra* note 1, at § 6.81 (highlighting New York's statute-based definition).

205. Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 261 (N.Y. App. Div. 1984).

206. *See* MCCARTHY, *supra* note 2, at §§ 6:87-6:92 (identifying examples of conduct not covered by New York statute).

207. Lombardo v. Doyle, Dane & Bernbach, 396 N.Y.S.2d 661, 664-65 (N.Y. App. Div. 1977).

208. 698 F.2d 831 (6th Cir. 1983).

209. *See id.* at 837 (recognizing that, had company used plaintiff's name, but not his celebrity identity, there would be no violation).

210. *See id.* at 832 (explaining that phrase "Here's Johnny" was "generally associated with [Johnny] Carson by a substantial segment of the television viewing public").

211. *See id.* at 832-33 (describing cause of action).

not have chosen it."[212] The court determined that the defendant had violated the plaintiff's right of publicity.[213] This is an example of a defendant who admittedly appropriated the plaintiff's identity; however, this conduct would not be captured by sections 50 and 51.

For these reasons, the current state of New York law enables a defendant to free-ride off many aspects of a celebrity's identity for advantage, and tends to ignore the subjective intentions of the defendant in using a celebrity's identity. Moreover, despite the remarks of the court in *Stephano,* that the words contained in sections 50 and 51 are sufficiently broad to protect commercial interests ordinarily protectable under the right of publicity, there remains a longstanding recognition of the doctrinal inadequacy of the right of privacy in protecting publicity interests.[214] Finally, given the importance of the entertainment industry to the state of New York, and the inherent need to afford protection to its entertainers, serious consideration ought be given to providing a greater level of protection, and in particular, to provide comparable protection to that offered under California law. The restricted protection afforded in New York, compared with California, means that, when looking at the entertainment industry, California-based celebrities are afforded a greater level of protection of their publicity rights than celebrities residing in New York.[215] "New York, as a hub for entertainers, does not allow celebrities to sufficiently protect their identities and personas from commercial exploitation."[216]

In stark contrast to New York, various decisions of the Court of Appeals for the Ninth Circuit have expanded California's common law right of publicity to protect against unauthorized uses of specific aspects of one's identity; for example, name, face and voice, as well as "mere evocations" of a celebrity's identity, which are not restricted to an exhaustive list of indicia, provided the appropriation

212. *See id.* at 836 (explaining defendant's motivation for choosing company name).

213. *See id.* at 837 (maintaining that plaintiff's identity was intentionally appropriated for commercial purposes).

214. *See* Stephano v. News Group Publ'ns., 64 N.Y.2d 174, 183, 182-83 (2d Cir. 1984) (explaining that statute is not limited to non-commercial purposes); *see also* Gautier v. Pro-Football, Inc., 304 N.Y. 354, 359 (2d Cir. 1952) (stating that mere use of name in informational context is not precluded without some connection to advertising purposes). For a further discussion of *Gautier*, particularly the comments of Justice Desmond, see *supra* notes 43-44 and accompanying text.

215. *See* Sinatra v. Nat'l Enquirer, Inc., 854 F. 2d 1191, 1202 (9th Cir. 1988) (describing protection of celebrity identity in California).

216. Dymond, *supra* note 30, at 448.

or evocation was for advantage.[217] "The growth of the right of publicity has been nowhere more apparent than in California, the predominant home of film, television, and music celebrities."[218]

California's position has received some criticism. Judge Kozinski, dissenting from the order rejecting a rehearing en banc, stated that the *White* decision:

> [E]rects a property right of remarkable and dangerous breadth . . . it's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind.[219]

According to Judge Kozinski, where an advertiser merely reminds the public of an aspect of a celebrity's identity, this may violate his or her publicity rights.[220] Such a violation can be accomplished without a "realistic rendering" of the celebrity.[221] Some commentators further note the difficulty in determining what constitutes a celebrity's identity.[222] In determining whether an individual's identity has been appropriated, the courts apply the "identifiability" test, asking whether "more than a de minimus number of ordinary viewers identify the [celebrity] by looking at (or listening to) the defen-

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217. *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974) (finding misappropriation of plaintiff's identity because automobile markings caused persons to believe automobile belonged to plaintiff, and was driven by plaintiff); Midler v. Ford Motor Co., 849 F.2d 460, 463-64 (9th Cir. 1988) (upholding plaintiff's tort claim for unauthorized used of sound-alike voice); White v. Samsung Elecs. Am., Inc., 971 F. 2d 1395, 1397-99 (9th Cir. 1992) (finding "that the common law right of publicity reaches means of appropriation other than name or likeness" and "the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity"). In *White*, Circuit Judge Goodwin held that "[t]he identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice." *Id.* at1399. This has since been referred to as the "evocation of identity" test. *See* Weiler, *supra* note 152, at 258; Clay, *supra* note 168, at 497-98.

218. Bartz, *supra* note 1, at 300.

219. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1514 (9th Cir. 1993).

220. *See* Weiler, *supra* note 152, at 258 (explaining that identifiability triggers liability); *see also* Clay, *supra* note 168, at 497-98 (indicating that touchstone of right of publicity violation is evocation of plaintiff's image for commercial purposes).

221. *See* Weiler, *supra* note 152, at 259-60 (illustrating right of publicity violation where public is reminded of plaintiff celebrity); *see also* Clay, *supra* note 168, at 497-98 (requiring only that evocation somehow remind audience of plaintiff).

222. *See* David Tan, *Much Ado About Evocation: A Cultural Analysis of "Well-Knownness" and the Right of Publicity*, 28 CARDOZO ARTS & ENT. L.J. 317, 320 (2010) (noting that each state has its own definition of identity).

dant's advertisement."[223] Despite the law's constant efforts to promote certainty, however, efforts should not be made to define the outer limits of what constitutes a celebrity's identity. To do so would be counter-intuitive to the purpose of preventing unauthorized uses of one's identity for advantage. As the court noted in *White*:

> *Motschenbacher*, *Midler*, and *Carson* 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.[224]

The law should, at its optimum level, remain as flexible as possible to prevent the clever, free-riding advertiser from obtaining the benefits of using a celebrity's identity without obtaining the celebrity's consent, or paying an appropriate fee.

Moreover, it has been said that the evocation of identity test fails to define the extent to which a celebrity's identity must be evoked before it amounts to a publicity rights violation.[225] Weiler considered a hypothetical scenario: instead of a car manufacturer engaging a Better Midler sound-alike singer and instructing her to "sound as much as possible . . . like Bette Midler" when singing "Do You Want To Dance" in its advertisement, the manufacturer engages a male singer who sounds nothing like Bette Midler.[226] Weiler considered that, by applying *White*, the public would be reminded of Midler when the male sings this song, and this would violate Midler's right of publicity, absent her consent.[227]

However, Weiler has seemingly extrapolated the *White* evocation of identity test beyond the limits intended by the court. In *White*, the court was satisfied that the plaintiff's identity had been evoked, because the individual aspects of the advertisement "leave

223. McCarthy, *supra* note 3, at 135.

224. White v. Samsung Elecs. Am., Inc., 971 F. 2d 1395, 1398 (9th Cir. 1992).

225. *See* Tan, *supra* note 222, at 324 (commenting on lack of clarity in determining extent of use of identity that constitutes publicity rights violation).

226. Weiler, *supra* note 152, at 259 (citing Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988)) (presenting different facts to demonstrate an alternate outcome).

227. *See id.* (arguing that Midler's publicity claim would preclude advertisers from using any version of song associated with Midler without first obtaining her consent).

little doubt about the celebrity the ad is meant to depict."[228] The court further considered that Michael Jordan's identity would be evoked if a hypothetical advertisement featured a robot with male features, of African-American complexion and a bald head, sporting a red basketball uniform with the number "23" on it, dunking a basketball with the signature one-handed, split leg action.[229] According to Judge Goodwin, "any sports viewer who has registered a discernible pulse in the past five years would reach [the conclusion that]: . . . the ad is about Michael Jordan."[230]

McCarthy made it clear that unauthorized use of any indicia of a person's identity can infringe the right of publicity, if the indicia "are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity."[231] Therefore, contrary to Judge Kozinski's views, in order to violate a person's publicity rights, it is not sufficient to "merely remind . . . or vaguely to conjure up" a celebrity's identity.[232] What is required is an unequivocal identification with the plaintiff, that is, "so closely and uniquely" associated with the celebrity's identity to allow an appropriation of that person's publicity value.[233]

For these reasons, the scope of the evocation of identity test pronounced by Weiler appears to be flawed. In fact, it is difficult to fathom how an advertisement featuring a male singing a song made famous by Bette Midler would lead the public to believe that the advertisement is about Bette Midler, although it may very well remind the public of her.

For the aforementioned reasons, the protection afforded to publicity rights in New York is inadequate and insufficient, and efforts should be made, either legislatively or by revisiting the position at common law, to overrule *Stephano* and follow the approach taken under California's expansive common law right of publicity. For the avoidance of doubt, the following approach should be adopted in New York:

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228. *White*, 971 F. 2d at 1399.

229. *See id.* (examining hypothetical facts under evocation of identity test).

230. *Id.*

231. Halpern, *supra* note 5, at 863-64 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)).

232. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1514 (9th Cir. 1993). *See also* Halpern, *supra* note 5, at 863-64 (discussing what constitutes violation of person's right of publicity).

233. *See* Halpern, *supra* note 5, at 863-64 (explaining requirement for violation of right of publicity).

1. The courts should focus on *whether* a celebrity's identity has been appropriated without his or her consent, rather than *how* it was appropriated;[234]
2. "Identity" should not be limited to a celebrity's "*name, portrait, picture and voice*" but rather should encompass any identifiable aspects of a celebrity's identity, using the identifiability test;[235] and
3. The *White* evocation of identity test should be adopted, provided the indicia of identity used are "so closely and uniquely associated with the identity of [the celebrity] that their use enables the defendant to appropriate the commercial value of the [celebrity's] identity."[236]

VIII. CONCLUSION

The states of California and New York adopt markedly different levels of protection to celebrity's right of publicity. As the law currently stands, New York law prevents any unauthorized uses of a celebrity's "name, portrait, picture and voice" for advertising or trade purposes, and does not recognize a separate right of publicity at common law.[237] There are a number of different means by which a celebrity's identity can be appropriated other than by using a person's "name, portrait, picture and voice," thereby enabling the "clever advertising strategist" to free-ride on the commercial value associated with a celebrity's identity without being required to seek that celebrity's consent.[238]

The approach taken by the California courts, which focuses on *whether* a celebrity's identity has been appropriated, rather than *how* it was appropriated, should be preferred and adopted by New York.[239] Moreover, the definition of what constitutes a celebrity's identity should not be limited to a celebrity's "name, portrait, picture and voice" but expanded to capture any identifiable aspects of a celebrity's identity under the identifiability test.[240] Finally, the ev-

234. *See White*, 971 F. 2d at 1398 (stating "[i]t is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so") (emphasis in original).

235. *See* McCarthy, supra note 3, at 135 (explaining identifiability test).

236. Halpern, *supra* note 5, at 863-64 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)).

237. *See* McCarthy, *supra* note 3, at 132-134 (explaining that New York has no common law of privacy).

238. *See White*, 971 F. 2d at 1398 (explaining that there are several creative ways to circumvent rules of publicity).

239. *See id.* (describing California approach).

240. *See* McCarthy, *supra* note 3, at 135 (explaining identifiability test).

ocation of identity test enunciated in the *White* decision should be adopted, provided the indicia of identity used are "so closely and uniquely associated with the identity of [the celebrity] that the use enables the defendant to appropriate the commercial value of the [celebrity's] identity."[241] The adoption of these principles, either legislatively or at common law, would enable a consistent level of protection to be afforded to entertainers, irrespective of whether they reside in New York or California.

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241. Halpern, *supra* note 5, at 863-64 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)).