Putting the Brakes on the Right of Publicity

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I. INTRODUCTION

The time has come to put the brakes on the right of publicity. The action has overflowed its intended banks and is swamping all that lies before it, including the First Amendment. Curiously, most of the damage is being done by the Ninth Circuit, purporting to apply California law. With one notable recent exception, the Ninth Circuit has upheld every single right of publicity claim to come before it, so that the simplest way to summarize the right of publicity is that there is a prima facie case *any time anybody uses anyone's name, likeness, or voice (or imitation thereof) for any reason.* Note the breadth of the action: anyone can be a plaintiff, not just celebrities. Also, the right applies to any use, not just a commercial use. It does not even require the use of the plaintiff's actual name, likeness, or voice (referred to herein as "persona"); liability can be based on use of the plaintiff's nickname or a "look-alike" or voice imitation.

All states recognize the right of publicity as a common-law right. Many states have statutes dealing with the right of publicity, but these statutes are usually *in addition to*, and not in lieu of, the common-law right (New York being one notable exception). Thus, plaintiffs usually get the benefit of the broader of the two rights (statutory or common law).

The fundamental problem with the right of publicity is that currently there is no principled set of defenses that apply, so defendants are often left "defenseless." This is in sharp contrast to most other torts, where the law has developed a set of standard defenses that may apply. To take only one example, for slander there are the defenses that the statement was (a) truthful, (b) privileged, or (c) mere opinion. Unfortunately, the law has simply not developed to this extent for the right of publicity, so the rare cases holding in favor of the defendants do so on an ad-hoc and inconsistent basis. The purpose of this article is to suggest a uniform set of defenses to a right of publicity claim.

The current broad application of the right of publicity has given celebrities the unilateral right to stop any remote or indirect reference to them; a result that is simply not intended or justified under any theory. For better or worse, celebrities have become woven into our cultural fabric, so to excise every reference to celebrities' personas would effectively overrule the First Amendment. Thus, a uniform set of defenses to right of publicity claims is a critical bulwark to defending the First Amendment.

II. Suggested Defenses

A. Incidental Use

For starters, there should be no liability for the mere incidental use of plaintiff's persona. For example, a twenty-seven second "clip" of plaintiff's singing performance and a single mention of his name in a movie was held not actionable because it was an incidental use.[1] Similarly, a brief discussion of plaintiff in a book is not actionable.[2] The California statute recognizing the right of publicity contains its own incidental use concept, which permits the use of any photograph, videotape, etc., of a person as part of a "definable group," including, without limitation, a crowd, audience, club, or team, as long as the individual has not been singled out in any manner.[3] This is a useful application of the incidental use concept and should be incorporated by case law into the common law, just as the common law incidental use concept has been incorporated by case law into the statute.[4]

Although the incidental use concept should be interpreted broadly, a defendant should not be able to create an incidental use simply by engaging in multiple uses. For example, the face of a baseball player on a baseball card should not be an incidental use merely because there are a large number of cards (each with a different face).

B. No Actual Use

There should be no liability when there is no actual use or direct imitation of plaintiff's persona, as any implied association would then be too tenuous. This defense is analogous to the idea/expression doctrine developed under the Copyright Act. Under this doctrine, the Copyright Act applies to prevent the unauthorized use of the *expression* of an idea, but it does not apply to prevent the unauthorized use of the idea itself.[5] This doctrine is essential to protecting the free flow of ideas, an essential element to the fabric of our society and a necessary concomitant to developing and improving on prior ideas. To date, the right of publicity cases have permitted liability based on any indirect

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[1] Brown v. Twentieth Century Fox Film Corp., 799 F. Supp. 166 (D.C. Cir. 1992). *See also* Namath v. Sports Illustrated, 48 A.D.2d 487, 488 (1975) ("[U]se of plaintiff's photograph was merely incidental advertising of defendant's magazine in which plaintiff had earlier been properly and fairly depicted."), *aff'd without op.*, 352 N.E.2d 584 (1976).

[2] Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880 (1974).

[3] Cal. Civ. Code § 3344(b)(2)(3)(Deering 2001).

[4] Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880 (1974).

[5] Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218 (1985).

invocation of plaintiff's persona.[6] Application of the idea/expression doctrine would protect any publication that did not involve the actual use or direct imitation of someone's persona. A drawing depicting the distinctive features of the plaintiff would be actionable, even if highly stylized.[7] On the other hand, the mere fact that the plaintiff's persona is called to mind by reason of association should not be actionable. For example, any reference to the film *Terminator 2* is likely to automatically call to mind Arnold Schwarzenegger, but such an indirect association should not be actionable. Were it otherwise, the free flow of ideas would be ground to a halt by those whose personas have any association to the ideas.

The most egregious case of this approach to date is the Ninth Circuit's decision holding that Samsung violated Vanna White's right of publicity with an advertisement showing a robot in an evening gown, blonde wig, and jewelry standing in front of the "Wheel of Fortune" gameboard.[8] Other than the evening gown, which is not an element of persona, the robot bore no resemblance to Vanna White, so only the "idea" of Vanna White had been used. Since any reference to the show "Wheel of Fortune," will almost always call to mind Vanna White, the court effectively granted her the exclusive right to any commercial reference to the show. Similarly, another case held that an advertiser violated a race car driver's right of publicity by using a highly modified photograph of his racing car in a cigarette advertisement.[9] Neither the driver nor his name could be seen, so this use should not have been actionable. Yet another case held that a manufacturer of portable toilets named "Here's Johnny" violated Johnny Carson's right of publicity.[10] While the phrase "Here's Johnny" certainly calls to mind Johnny

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[6] Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997) (robots of characters from "Cheers" in airport bar were actionable); White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993) (advertisement with robot in evening gown, blonde wig, and jewelry standing in front of the "Wheel of Fortune" gameboard was actionable); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) ("Carson's identity may be [wrongfully] exploited even if his name, John W. Carson, or his picture is not used."); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (use of highly modified photograph of plaintiff's race car was actionable). For a refreshing step back, see Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619 (6th Cir. 2000) (disapproving of *White v. Samsung* and holding that at least a "fringe actor" did not have a valid claim with respect to toy figure based on character he played but that had no personal resemblance to actor).

[7] Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (cartoon drawing of Muhammad Ali).

[8] White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993).

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

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

Carson, this is because of his famous introduction, not his name. For example, a portable toilet simply called "Johnny" would probably not invoke an association to Johnny Carson for the average person. Thus, it is idea association from his introduction, not the use of his name, that invokes the association to Johnny Carson. In all these cases, because of the tenuous link to the plaintiff, the public would not think that there is any actual association between the plaintiff and the product, so there should be no liability.

To a large extent, this suggested idea/expression dichotomy may have been adopted by the California Supreme Court in 2001, albeit in a different guise.[11] The court held that the First Amendment protects "transformative" works that add "significant transformative elements" to the plaintiff's image, such as the famous Andy Warhol portraits of celebrities.[12] This case dealt with images on t-shirts, and it is not clear whether it applies to advertising, although logically it should. This case is discussed in more detail below.

C. First Amendment

1. Matters of Public Interest

The Supreme Court has held that the First Amendment provides an absolute defense to publication-based tort actions for publications on matters of public interest, unless the publications contain knowing or reckless falsehood.[13] This protection applies to a broad range of publications, including magazine articles,[14] books,[15] and movies.[16] Advertisements, however, are not matters of public interest, so they do not qualify for this defense.[17]

In order to provide broad First Amendment protection, the definition of "public interest" sweeps up any publication regarding public figures and celebrities,[18] as well as publications regarding private citi-

[11] Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001).

[12] Contrast Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (Muhammad Ali's right of publicity violated by highly stylized cartoon).

[13] Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3008 (1974) (defamation); Time, Inc. v. Hill, 87 S. Ct. 534 (1967) (public disclosure of private facts).

[14] Time, Inc. v. Hill, 87 S. Ct. 534 (1967).

[15] Maheu v. CBS, Inc., 201 Cal. App. 3d 662 (1988).

[16] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989); Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860 (1979).

[17] *See* Hoffman v. Capital Cities/ABC, Inc. 255 F.3d 1180 (9th Cir. 2001); Abdul-Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996).

[18] *See* New York Times v. Sullivan, 84 S. Ct. 710 (1964) (defamation); Hoffman v. Capital Cities/ABC, Inc. 255 F.3d 1180 (9th Cir. 2001). *But see* Ali v Playgirl, Inc., 447 F.Supp. 723, 727 (S.D.N.Y. 1978) (holding that a magazine cartoon depicting the plaintiff was not "news" because the cartoon itself had no "newsworthy dimension").

zens who become associated with some issue that has caught the public eye.[19] For example, the defense has been extended to protect a photograph in a magazine of a couple in a romantic pose as within the ambit of public interest as entertainment.[20]

In one remarkable case (particularly for the Ninth Circuit), the Ninth Circuit held that the First Amendment protected a digitally altered photograph featured in a fashion article in *Los Angeles Magazine* in which Dustin Hoffman's cross-dressing character from *Tootsie* was "re-dressed" in attire from a designer that advertised in that edition of the magazine.[21] Without discussion, the court seemed to assume that the article qualified as a matter of public interest. More remarkably, the court held that the intentional re-dressing of Dustin Hoffman was not a knowing falsehood because reasonable readers would know from the context of the article that the magazine had done it by computer. There are several issues left open by the court's decision:

• Does the decision only apply when there is *some* accompanying text or discussion? Did the case simply assume that the minimal discussion of fashion qualified as a matter of public interest, or were the photos themselves the matter of public interest? Since the topic of the article (new fashions) had nothing to do with Dustin Hoffman, it appears that *no* accompanying text or discussion is required.

• If *no* accompanying text or discussion is required, would the case permit a picture book of celebrities? Although the case dealt with a magazine, what about celebrity pictures on posters or t-shirts? What about celebrity pictures on a restaurant wall?

• What is somewhat disturbing is the treatment of the photograph of the celebrity as almost per se a matter of public interest.[22] This would seem to permit open hunting season on celebrities. Why do magazines need models anymore? Can they just cut and paste Cindy Crawford into the latest fashions, with small print saying "we did this by computer"?

Shortly after this decision, the Ninth Circuit issued another case that applied the correct analysis and came to the opposite conclusion.[23] In this case, a surfwear company put out a catalog that included short

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[19] *See* Time, Inc. v. Hill, 87 S. Ct. 534 (1967) (article about crime victims); Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536 (1993) (documentary on surfers); Howell v. New York Post, 612 N.E.2d 699 (N.Y. 1993) (photograph of well-known person, with plaintiff at her side, at psychiatric hospital).

[20] *See* Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 229 (1953).

[21] Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).

[22] *Contrast* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (holding that a cartoon in a magazine was not "news" because the cartoon itself had no "newsworthy dimension").

[23] Downing et al. v. Abercrombie & Fitch, 2001 U.S. App. LEXIS 20377 (9th Cir. 2001).

articles on surfing as well as pictures of plaintiffs, famous surfers. The court stated:

> In the current action, there is a tenuous relationship between Appellants' photograph and the theme presented. Abercrombie used Appellants' photograph essentially as window-dressing to advance the catalog's surf-theme. The catalog did not explain that Appellants were legends of the sport and did not in any way connect Appellants with the story preceding it. . . . We conclude that the illustrative use of Appellants' photograph does not contribute significantly to a matter of the public interest and that Abercrombie cannot avail itself of the First Amendment defense.

The court then went on to distinguish the Dustin Hoffman case as follows:

> In contrast to the present case, where Abercrombie, itself, used Appellants' images in its catalog to promote its clothing, LA Magazine was unconnected to and received no consideration from the designer for the gown [worn by Dustin Hoffman] depicted in the article. Further, while LA Magazine merely referenced a shopping guide buried in the back of the magazine that provided stores and prices for the gown, Abercrombie placed the Appellants' photograph on the page immediately preceding the [t-shirts] for sale. Based on these factors, we conclude that Abercrombie's use was much more commercial in nature and, therefore, not entitled to the full First Amendment protection accorded to LA Magazine's use of Hoffman's image.

The distinction is not terribly convincing, particularly given that the "Tootsie" article in LA Magazine was merely filler for fashion design advertisements. It was obviously not coincidence that the designer of the "Tootsie" dress advertised in that very edition.

The statutory provisions recognizing the right of publicity provide a defense for use of someone's persona in connection with any "news,"[24] which has been interpreted to be at least as broad as, if not broader than, the First Amendment protection for publications on matters of public interest.[25] The definition of "news" within the statute has been interpreted similarly to the First Amendment defense by excluding publications that were knowingly or recklessly false.[26]

There are limitations on the First Amendment defense for publications on matters of public interest. The Supreme Court has held that an unauthorized television news broadcast of an *entire* human cannonball

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[24] *See, e.g.*, CAL. CIV. CODE § 3344(d) (Deering 2001).

[25] New Kids on the Block v. New America Pub., Inc., 971 F.2d 302 (9th Cir. 1992); Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536 (1993); Maheu v. CBS, Inc., 201 Cal. App. 3d 662 (1988); Eastwood v. Superior Court, 149 Cal. App. 3d 409 (1983).

[26] Eastwood v. Superior Court, 149 Cal. App. 3d 409 (1983).

act was not protected because it caused a substantial threat to the economic value of the performance.[27]

2. Parodies

The Supreme Court has held that a parody, even a highly offensive one, of a public figure is protected by the First Amendment, except in the unusual case where a reasonable person would believe that the parody expresses a statement of fact, and the fact is untrue.[28] Although the decision dealt with an action for intentional infliction of emotional distress, the result would have to be the same for a right of publicity action, or the decision would be toothless.[29] In order to be protected, the parody should relate directly to the plaintiff; it should not be enough that the plaintiff's persona is used in connection with a parody of something other than the plaintiff, or the defense would become too broad.

3. Works of Fiction

Many courts have held that there is First Amendment protection against a right of publicity claim for fictionalized stories involving the plaintiff.[30] For example, one case involved a fictional story based around Valentino's life,[31] and another case involved a fictionalized story based on a true event that referred to a ten-year old character referred to as "Squints Palledorous," which vaguely resembled the plaintiff, Michael Polydoros, thirty years earlier.[32]

All of these cases dealt with fictionalized stories, based to some extent on true events. Unfortunately, the language in all the cases is broad enough to be read as providing First Amendment protection against a right of publicity claim for *all* works of fiction, but this clearly cannot be the case. At the extreme, if a film company creates a digital version of Harrison Ford without his permission and uses that image in various admittedly fictional movies (e.g., a sequel to *The Fugitive*), it is

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[27] Zacchini v. Scripps-Howard Broadcasting Co., 97 S. Ct. 2849 (1977).

[28] Hustler Magazine, Inc. v. Falwell, 108 S. Ct. 876 (1988) (highly offensive cartoon of religious leader).

[29] Cardtoons, L.L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996) (applying parody defense to right of publicity claim); San Francisco Bay Guardian, Inc. v. Superior Court, 17 Cal. App. 4th 655 (1993) (applying parody defense to defamation claim).

[30] *See* Ruffin-Steinback, et al. v. DePasse, 2001 U.S. App. LEXIS 21085 (6th Cir. 2001) (fictionalized account of The Temptations); Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994) (fictionalized story of police officer); Seale v. Gramercy Pictures, 949 F. Supp. 331 (E.D. Pa. 1996) (fictionalized story of the Black Panthers); RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 47.

[31] Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860 (1979).

[32] Polydoros v. Twentieth Century Fox, 67 Cal. App. 4th 318 (1997).

hard to imagine that Harrison Ford would not have a valid right of publicity claim. On the other hand, a film company should be able to use a digital version of Harrison Ford if it were making a movie, even fictionalized, about the life of Harrison Ford. While the current case law does not clearly make this distinction, the distinction seems compelled on the basis of pure fairness. The tough case will be when a film company makes the sequel to *The Fugitive* with a digital version of Harrison Ford, but calls the character Harrison Ford in the film and defends it as a fictionalized work.

If a fictionalized work is protected against a right of publicity claim by the First Amendment, the plaintiff may still have a valid claim for defamation for portrayal of the plaintiff in a false light. Some courts hold that fictionalized works are also protected against a false light claim by the First Amendment,[33] while some courts permit a false light claim to stand.[34] Since a false light claim is analogous to defamation, and since there is no First Amendment right to commit defamation with impunity, there should be no First Amendment defense to a false light claim. It should be fairly easy to avoid these claims, however, by clearly stating that the work is fictionalized.

4. "Transformative" Works

In an extremely important decision rendered in 2001, the California Supreme Court held that the conflict between the First Amendment and the right of publicity required a "balancing of interests."[35] The Court held that pictures or paintings, without accompanying text or discussion, even on merchandise, are protected by the First Amendment against right of publicity claims, but *only* for "transformative" works that reflected "significant transformative elements" to the plaintiff's image, such as the famous Andy Warhol portraits of celebrities.[36] The decision was long on words but short on logic and left unanswered a number of questions, including the following:

- What if a "transformative" image is used to advertise a product? For example, does this case overrule the Vanna White decision and its progeny?
- Does the same rationale apply to works that use the plaintiff's name or voice?

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[33] Rogers v. Grimaldi, 695 F. Supp. 112 (S.D.N.Y. 1988).

[34] Seale v. Gramercy Pictures, 949 F. Supp. 331 (E.D. Pa. 1996).

[35] Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001).

[36] *Contrast* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (Muhammad Ali's right of publicity violated by highly stylized cartoon).

D. Express or Implied Consent

Another defense to the publication-based tort actions is if the plaintiff gives express or implied consent to the publication.[37] Express consent is straightforward, but implied consent should be interpreted broadly based on the expectations of a reasonable person in the circumstances. For example, actors in a movie should be held to implicitly consent to use of their personas in advertisements for the movie, just as those who pose for a picture should be held to implicitly consent to an intended use of the picture that they were aware of at the time. Similarly, those who become advisory or honorary members of a board of directors of a charitable organization should be held to implicitly consent to a listing of their name and capacity in an advertisement by the charitable organization. In addition, athletes in a game that they know is being televised should be held to implicitly consent to the televised broadcast and any subsequent broadcasts, outtakes, etc., that are within the reasonable contemplation of the athletes at the outset.

E. Fair Use

There should also be a "fair use" defense based on analogy to copyright or trademark law.[38] Just as is case with copyrights or trademarks, there needs to be a safety net to cover the use of someone's persona that just seems fair but that does not fit under any other defense. For example, it is common for agencies and studios to run congratulatory ads for their actors that win awards, and these kinds of ads should not be actionable. On the other hand, GM ran a series of these congratulatory ads with pictures of their pick-up trucks, and these ads seem unfair, because there is an implication that the actors endorse GM trucks. As tempting as this defense is, to date it has been rejected by the courts.[39]

F. Death

Another defense, at least in California, is that the persona used is of a deceased person. There is no common law right of publicity for deceased persons in California.[40] California Civil Code section 3344.1 provides a statutory cause of action for deceased celebrities, but there is a blanket exemption for "fictional or non-fictional entertainment or a dramatic, literary, or musical work." Presumably, this statute would al-

[37] Kapellas v. Kofman, 1 Cal. 3d 20 (1969).
[38] 17 USC § 107 (copyright); 15 USC § 1115(b)(4) (trademark).
[39] Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001).
[40] Lugosi v. Universal Pictures, 25 Cal. 3d 813 (1979).

low the digital recreation of a deceased celebrity for use in a new movie; we could have Marilyn Monroe in *Some Like It Hotter.* The dangerous part about relying on California Civil Code section 3344.1 is that if the decedent resided, or the movie was shown, outside of California, the laws of other states may apply, and the defendant should assume that it will be sued under the laws of the state with the least protection.

G. Privileged

Another defense to a right of publicity claim should be that the publication is legally privileged, as when it occurs in the context of a legislative, judicial, or administrative proceeding.[41]

III. Suggested Non-Defenses

Some defendants have argued for, and some cases have applied, improper defenses to right of publicity actions. This section of this article analyzes these purported defenses to demonstrate why they should not be applicable.

A. Copyright Act Preemption

In a blatantly wrong decision, the Seventh Circuit held that the Copyright Act preempted a right of publicity claim by baseball players objecting to televised broadcasts of their games.[42] Unfortunately, this case has taken on a life of its own and has been followed by a number of other cases.[43] In reaching its decision, the Seventh Circuit held that the players were the "authors" of the televised games within the meaning of the Copyright Act. However, the "author" of a televised game is the company that films the game.[44] The players were not the "authors" of the work; they were the subject of the work.

The Copyright Act protects authors and owners of a work, while the right of publicity protects the subjects of a work. The Copyright Act and the right of publicity protect entirely different interests, so Copyright Act preemption does not apply.[45] For example, the Supreme

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[41] *See, e.g.*, Cal. Civ. Code § 47 (Deering 2001) (for defamation).

[42] Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986), cert. denied, 107 S. Ct. 1593 (1987).

[43] *See, e.g.*, Fleet v. CBS, 50 Cal. App. 4th (1996) (Unpaid actors' right of publicity claim was preempted by Copyright Act.).

[44] 17 U.S.C. § 201(b).

[45] *See* Downing et al. v. Abercrombie & Fitch, 2001 U.S. App. LEXIS 20377 (9th Cir. 2001); Brown v. Ames, 201 F.3d 654 (5th Cir. 2000); KNB Enterprises v. Matthews, 78 Cal. App. 4th 362 (2000).

Court has held that the unauthorized broadcast of an entire cannonball act was a violation of the right of publicity, even though the broadcaster undoubtedly owned the copyright to the broadcast.[46] Similarly, the courts have held that plaintiffs are not preempted by the Copyright Act to object to the imitation of their voice in a song on a commercial, even if the defendant has the valid right to use the words and music to the song under the Copyright Act.[47] Therefore, Copyright Act preemption should not have been a defense to the baseball players' cause of action; instead, the case should have been decided the same way based on implied consent, discussed above.

B. Disclaimers

Some commercials imitate celebrity voices and end with the disclaimer, "celebrity voices impersonated." If such disclaimers were allowed as a defense, the right of publicity would be eviscerated; for example, an advertiser could use a perfect imitation of the plaintiff's voice in a song in any commercial, and would rely on a disclaimer as a defense. This cannot be allowed.

C. Non-Celebrities

In a right of publicity action, the harm to the plaintiff is a personal one. Many courts phrase the right of publicity as the exclusive right to exploit one's persona and to prevent others from doing so without payment.[48] This formulation puts a demonstrably commercial spin on the right and suggests economic, not personal, injury. This commercial formulation, however, overlooks the ultimate source of the right, which is the *personal* "right to be let alone." Even in the classic case of a celebrity bringing the action for the commercial use of the celebrity's persona, the facts frequently state that the dispute is not for lack of payment; the celebrity is often offended by any commercial use of their persona.[49] It is for this reason that the right of publicity should not be limited to celebrities or public figures, and should apply equally to private citizens.[50]

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[46] Zacchini v. Scripps-Howard Broadcasting Co., 97 S. Ct. 2849 (1977).

[47] Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), cert. denied, 113 S. Ct. 1047 (1993).

[48] Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001)

[49] *See, e.g.*, *Waits*, 978 F.2d at 1093.

[50] *See* Maheu v. CBS, Inc., 201 Cal. App. 3d 662 (1988) (assumed without discussion); Stilson v. Reader's Digest Assn., Inc., 28 Cal. App. 3d 270 (1972), cert. denied, 93 S. Ct. 1928 (1973) (listing sweepstake finalists without permission); Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82 (1955) (A private citizen has a cause of action if they are listed, without consent, as endorsing a particular product.); Howell v. New York Post,

IV. CONCLUSION

The real problem with right of publicity cases is that merely to be sued is to lose, even if the defendant ultimately wins the case, because of the legal fees incurred to defend the case and the threat of almost limitless liability. Because of the muddy law in this area, these cases are almost never resolved at the summary judgment stage. The mantra of most publishers and film companies has thus become, "When in doubt, leave it out," resulting in a real hit to the First Amendment. This article suggests a set of uniform defenses to right of publicity claims. Since these defenses turn on questions of law, they are particularly appropriate to be applied at the summary judgment stage, thus ending the real problem with right of publicity claims and reducing the chilling effect the specter of these claims has on freedom of expression.

612 N.E.2d 699 (N.Y. 1993). *But see* Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 624 (6th Cir. 2000) (also stating that the right applies only to celebrities and citing additional cases supporting this proposition); Brewer v. Hustler Magazine, Inc., 749 F.2d 527 (9th Cir. 1984) (stating that the right applies only to celebrities).