NOTE

The Right of Publicity: Finding a Balance in the Fair Use Doctrine — *Hoffman v. Capital Cities/ABC, Inc.*

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INTRODUCTION

In March 1997, actor Dustin Hoffman appeared in a fashion publication, Los Angeles Magazine (LAM), resplendent in a silk gown designed by Richard Tyler, with shoes by Ralph Lauren.[1] Mimicking his famous role as a cross-dressing unemployed actor in the film *Tootsie*, the photographs were part of an article and shopping guide featuring famous actors wearing designer clothes.[2] While such publicity might thrill some celebrities, Hoffman was not at all happy.[3] LAM's photograph suggested that Hoffman approved the use of his image and that he endorsed the designer gown and shoes.[4] As Hoffman's character in *Tootsie* demonstrated, however, appearances can be misleading.

Contrary to the message that LAM's photograph conveyed, Hoffman never posed for the magazine or consented to its use of his image.[5] Indeed, as an established actor, Hoffman consistently refused to endorse any commercial products, fearing that to do so would undermine his professional integrity.[6] Despite his strict policy, however, LAM used Hoffman's image by merging his face onto a male model's body dressed in designer fashions.[7] For Hoffman, LAM's unauthorized use of his likeness could potentially damage the commercial value of his name and image.[8] Consequently, Hoffman sued LAM, claiming that its unauthorized use of his image violated his right of publicity.[9]

LAM, however, defended its action on the ground that Hoffman did not possess a right to prohibit its use of his image.[10] Rather, the

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[1] Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1183 (9th Cir. 2001); Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867, 870 (C.D. Cal. 1999). This introductory hypothetical is based on *Hoffman*, with some facts added for illustrative purposes.

[2] *Hoffman*, 255 F.3d at 1182-83; *Hoffman*, 33 F. Supp. 2d at 870.

[3] Hoffman maintained a strict policy of not endorsing products or services. *Hoffman*, 33 F. Supp. 2d at 870. Hoffman "scrupulously guided and guarded" the way his image was portrayed in the public. *Id.*

[4] *Id.* at 875 (noting that LAM intended to create false impression in minds of public).

[5] *Hoffman*, 255 F.3d at 1183; *Hoffman*, 33 F. Supp. 2d at 872.

[6] Dustin Hoffman is a successful motion picture actor with six Academy Award nominations, two Academy Awards, a Golden Globe Award, and an Emmy Award. *Hoffman*, 33 F. Supp. 2d at 869.

[7] *Hoffman*, 255 F.3d at 1183; *Hoffman*, 33 F. Supp. 2d at 870.

[8] *Hoffman*, 33 F. Supp. 2d at 872.

[9] Hoffman's complaint alleged violations of California's common law right of publicity; California statutory right of publicity, Cal. Civil Code section 3344; California unfair competition statute, Cal. Business and Professions Code section 17200; and the federal Lanham Act, 15 U.S.C. section 1125(a). *Hoffman*, 255 F.3d at 1183.

[10] *See Hoffman*, 255 F.3d at 1183. Right of publicity is the right of a person to control the commercial use of his or her identity. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 652A-

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photograph constituted an editorial expression protected by the First Amendment's free speech clause.[11] For LAM, Hoffman's right to exclude its use of his image would diminish its constitutional right to convey a public message.[12] LAM argued that public access to celebrity images was essential to its right of free speech.[13]

The resulting case, *Hoffman v. Capital Cities/ABC, Inc.*, illustrates the tensions between celebrities' desire to control the use of their images and the desire of others to use those images to express meaning.[14] In resolving this controversy, the Ninth Circuit sought to establish a standard for reconciling the competing claims of free speech and publicity rights.[15] Attempting to balance these rights, the court adopted a bright-line distinction between commercial and noncommercial speech.[16] According to the court, the right of publicity only extends to the commercial use of a celebrity's image.[17] LAM's use did not qualify as commercial speech because the article did not resemble a traditional advertisement.[18] Consequently, LAM did not need Hoffman's consent to use his image.[19]

This Note argues that the *Hoffman* court's bright-line approach to the right of publicity is insufficient and inconsistent. Instead, this Note advocates the adoption of a fair use exception in the right of publicity that balances the competing interests of celebrities and creators of new works. Part I describes the background of the right of publicity, its establishment as a property right, and the issues that arise from granting the right of publicity. Part II discusses the background, facts, holding, and rationale of *Hoffman v. Capital Cities/ABC, Inc.* Part III argues that the *Hoffman* holding fails to reconcile the competing interests implicated in the right of publicity. Finally, Part III proposes the adoption of the fair use doctrine as the best way to resolve these interests.

652I (1977); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. LAW REV. 193 (1890); *infra* Part I.A.

[11] *Hoffman*, 255 F.3d at 1183.

[12] *See id.*

[13] *Id.*

[14] *See id.* at 1180.

[15] *Id.* at 1183-84 (quoting Landham v. Lewis Galoob Toys, Inc., 227 F.3d 614, 626 (6th Cir. 2000)).

[16] *Hoffman*, 255 F.3d at 1184-86.

[17] *Id.*

[18] *Id.*

[19] *Id.*

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I. BACKGROUND

At the heart of the right of publicity is the legal recognition of an individual's right to hold ownership over one's personal identity.[20] This right, known as a "personality right," first functioned under the umbrella of the right of privacy and served as protection against invasions of privacy.[21] With the rise of commercialization and advertising, however, courts began to recognize that the right of privacy offered inadequate protection to public figures.[22] Thus, a new right emerged.[23] Unlike the old privacy based right, this new right — the right of publicity —rested on the concept of property and ownership of one's identity and image.[24] This section traces the development of the personality right. Specifically, it focuses on the transition from the right of privacy concept to its present-day formulation as the right of publicity within the intellectual property regime.

A. Right of Publicity: Move Toward a Property Right

Justices Samuel Warren and Louis Brandeis first articulated the theory of a personality right in an 1890 law review article.[25] Justices Warren and Brandeis argued for a right of privacy by asserting that the law had already recognized the need to provide a more complete protection to persons.[26] Complete protection included the right to life and the right to enjoy life.[27] These rights would be meaningless without the right to privacy, which the authors expressed as the "right to be let alone."[28]

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[20] *See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2002) (commenting that right of publicity deals with proprietary interest of individual).

[21] This Note uses the term "personality right" to denote a legal right that an individual can claim over oneself. Under privacy law, a personality right is the right to be free from emotional and mental injury associated with unauthorized use of one's name and image. *See generally*, MCCARTHY, *supra* note 20, §§ 1:4 to :26 (tracing development of personality right from right of privacy to right of publicity). Under the right of publicity, the personality right is a property right to control, to exclude, and to transfer one's name and image. *Id.*

[22] *See* MCCARTHY, *supra* note 20, § 1:25.

[23] *Id.*

[24] *See* Warren & Brandeis, *supra* note 10, at 195-96.

[25] Warren & Brandeis, *supra* note 10 (arguing that individuals have right to privacy in order to prevent unauthorized disclosure by press). A few court decisions before 1890 also mentioned the right to privacy. *See* Harold Green, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 553 & n.1 (1960).

[26] Warren & Brandeis, *supra* note 10, at 193-196.

[27] *Id.*

[28] *Id.* at 195.

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Changes in society, such as the invention of instantaneous photographs and the increased circulation of newspaper publications, however, posed a threat to these rights.[29] These mediums facilitated the rapid and unauthorized circulation of private facts and pictures to the public.[30] Such publicity often amounted to intrusive disclosure of personal information by the press.[31] For those who did not consent to such disclosures, the result was often emotional and mental harm.[32] To counter such intrusions, Warren and Brandeis urged courts to adopt a common law right of privacy to protect individuals from unwanted publicity.[33]

Warren and Brandeis' seminal article influenced many jurisdictions to recognize a common law right of privacy.[34] When plaintiffs challenged the unauthorized uses of their photographs in advertisements, courts used the right of privacy to grant relief.[35] In granting relief, these courts

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[29] *See id.* at 195-96 (asserting that new mechanisms and news media have invaded sacred precincts of private and domestic lives).

[30] *See id.*

[31] *See id.*

[32] *See* Warren & Brandeis, *supra* note 10, at 195-96. Although the law of libel and slander also addresses the problem of intrusion by the press, it was inadequate to address the issue of privacy. *Id.* at 218. Libel and slander only protects against *false* publicity and thus only protects against *inaccurate* portrayal of private lives. *Id.* The purpose of the right of privacy is to "prevent [portrayal of private life] being depicted at all." *Id.*

Historically, the concept of a privacy right can be traced as far back as ancient Jewish and Roman laws. MCCARTHY, *supra* note 20, § 1:9. Jewish Mishnah prescribed that a household's walls be a certain height so that a neighbor could not peer into another's house. *Id.* Roman law incorporated the concept that a person had a right to be left alone. *Id.* It recognized that a person incurred injury or outrage when another person acted with willful disregard for the person's personality. *Id.* This recognition of duty of law to redress injuries to human dignity was lost during the Middle Ages and did not resurface until 1890. *Id.*

[33] *See* Warren & Brandeis, *supra* note 10, at 219-20. Common law is a body of law that comes from judicial decision as opposed to statutes or constitutions. BLACK'S LAW DICTIONARY 221 (7th ed. 2000).

[34] Professor Melville Nimmer states that the article is recognized as the most influential law review article ever written, inducing fifteen states to adopt a common law right of privacy. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, (1954). These states include Alabama, Arizona, California, Georgia, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Missouri, Montana, North Carolina, Oregon, and Pennsylvania. *Id.* at 203, n.4. Some states, such as New York, however, refused to recognize a common law right of privacy. *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902) (citing institutional incompetence challenged New York legislature to pass statute on right of privacy to prevent impermissible use of person's name in publicity).

[35] *See, e.g.*, Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207, 211-12 (1942) (holding that plaintiff has sufficient cause of action for alleging invasion of privacy because defendant used plaintiff's name in its advertising letter without prior consent); Bazemore v.

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reasoned that the advertisers invaded plaintiffs' right to privacy by thrusting them into the public spotlight without consent.[36] Concentrating on the unauthorized commercial use of plaintiffs' images and the resulting affront to human dignity, courts awarded compensation for emotional and mental injuries.[37] Thus, the right of privacy evolved into a personal tort action based on mental anguish, increasing the protection of the personality rights of individuals.[38]

Under tort law, the law of privacy afforded adequate protection to private individuals against an advertiser's unauthorized use of their names and images.[39] In such cases, the principal harm was an injury to feelings.[40] For public figures, however, the right of privacy failed to provide adequate protection against infringements.[41] For celebrities, who perpetually place themselves in the public eye, to claim humiliation or emotional injury from publicity appeared paradoxical.[42] Celebrity status itself placed an economic value on their names and images.[43]

Savannah Hosp., 155 S.E. 194, 196 (Ga. 1930) (holding that parents can bring action under right of privacy against hospital defendant for using their child's picture in its advertising without their consent); Pavesich v. New England Life Ins. Co., 50 S.E. 68, 79-80 (Ga. 1905) (finding invasion of privacy for impermissible use of plaintiff's photograph in insurance advertisement).

[36] *Kerby*, 53 Cal. App. 2d at 210 ("Here the plaintiff was, without her consent, plucked from her regular routine of life and thrusted before the world."); *Bazemore*, 155 S.E. at 196-97; *Pavesich*, 50 S.E. at 79-80.

[37] *See Pavesich*, 50 S.E. at 73 (concluding that there is no need for plaintiff to prove special damages because jury can assess wounded feeling resulting from misappropriation of identity).

[38] Under tort law, right of privacy was divided into four categories: intrusion, disclosure, false light, and appropriation. RESTATEMENT (SECOND) OF TORTS *supra* note 10, §§ 652A–652I. The Restatement adopted the four categories of privacy from William Prosser who outlined the four separate parts in a law review article in 1960. William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); *see* MCCARTHY, *supra* note 20, §§ 1:18 to :24 (describing Prosser's four categories of privacy law).

[39] RESTATEMENT (SECOND) OF TORTS, *supra* note 10, §§ 652A–652I.

[40] *Pavesich*, 50 S.E. at 73-78; MCCARTHY, *supra* note 20, § 1:17 ("focusing upon the indignity and mental trauma incurred when one's identity was widely disseminated in an unpermitted commercial use").

[41] *See, e.g.*, O'Brien v. Pabst Sales Co., 124 F.2d 167, 169-70 (5th Cir. 1941) (concluding that professional football player cannot claim privacy infringement); Pallas v. Crowley-Milner & Co., 54 N.W.2d 595, 597 (Mich. 1952) (holding that model cannot bring action under right of privacy); *see also* MCCARTHY, *supra* note 20, § 1:25.

[42] *See, e.g.*, O'Brien, 124 F.2d at 169-70 (holding that professional football player could not claim right of privacy because he was not private person, but national football figure); *Pallas*, 54 N.W.2d at (Mich. 1952) (holding that model plaintiff could not bring action against infringement of privacy because she had embraced public life); *see also* MCCARTHY, *supra* note 20, § 1:25.

[43] *See O'Brien*, 124 F.2d at 168; *Pallas*, 54 N.W.2d at 561.

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Celebrities argued that the unauthorized use of their name or image deprived them of their financial investment.[44] Consequently, celebrities not only claimed hurt feelings but also economic damages.[45]

Courts routinely rejected celebrities' attempts to invoke the right of privacy against unauthorized use of their images in advertisements.[46] Many courts reasoned that celebrity plaintiffs had waived their rights to privacy by virtue of holding professionally public lives.[47] Thus, to the degree that an individual's life ceased to be private, courts withdrew the protection of privacy.[48]

The right of privacy also posed a problem for public figures and advertisers because it was incapable of assignment.[49] The problem arose when celebrities authorized commercial uses of their identities in the form of exclusive licenses and contracts.[50] For example, a court in 1935 refused to uphold an exclusive contract granting a baseball bat manufacturer the right to use the names of professional baseball players in its products.[51] The court held that these baseball players could not assign their names for exclusive use on baseball bats because the names did not constitute property.[52] According to the court, the contract amounted to nothing more than a waiver of the right to sue for invasion of privacy.[53] Thus, the manufacturer did not possess any legal grounds to enforce its exclusive contract against a competitor for using the same baseball players' names to advertise its bats.[54] Without the right of

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[44] *See* cases cited *supra* note 43.

[45] *See* cases cited *supra* note 43.

[46] *See O'Brien*, 124 F.2d at 168; *Pallas*, 54 N.W.2d at 562.

[47] *See, e.g., O'Brien*, 124 F.2d at 170-72 (finding that professional football player cannot claim damages under privacy law for unauthorized use of his picture in beer advertising because he is not private person, having been most publicized football player of year in 1938-39); Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004 (W.D. Okla. 1938) (holding that Paramount stars waived their rights to privacy so that defendant could sell posters bearing stars' name and photographs without permission), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939); *Pallas*, 54 N.W.2d at 596-97 (concluding that model waived any rights to recover for unauthorized commercial use of her identity under privacy law because she was public figure).

[48] Warren & Brandeis, *supra* note 10, at 214-15.

[49] MCCARTHY, *supra* note 20, § 10:3, at 10-4; Nimmer, *supra* note 34, at 209. Assignment refers to the transfer of a right. BLACK'S LAW DICTIONARY, *supra* note 33, at 91.

[50] *See, e.g.*, Hanna Mfg. Co. v. Hillerrich & Bradsby Co., 78 F.2d 763, 767 (5th Cir. 1935) (holding that right of privacy cannot be assigned in form of property).

[51] *Id.*

[52] *Id.* at 766 ("Fame is not merchandise").

[53] *Id.* at 767.

[54] *Id.* ("[T]he contracts . . . operate only to prevent the signers from objecting to [grantee's] use of their names and likeness.").

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assignability, celebrities could not economically benefit from signing exclusive contracts with advertisers.[55]

These inherent inadequacies in the right of privacy set the stage for the creation of a personality right based on the concept of property.[56] In 1953, the Second Circuit rendered an unprecedented decision establishing a new personality right in the form of property — the right of publicity.[57] In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, two competing chewing gum companies both claimed the right to use a professional baseball player's photograph in its advertising.[58] The plaintiff, Haelan Laboratories, claimed its right based on an exclusive contract with the baseball player.[59] The defendant, Topps, argued that Haelan could not claim exclusivity because no such right existed.[60] The court rejected the argument that an exclusive contract only amounted to a waiver of the right to sue for invasion of privacy.[61] Instead, the court held that individuals did possess a property right in their identities that extended beyond the right of privacy.[62] That property right allowed individuals to grant exclusive use of their identities to one company in a defined market.[63] Similarly, ownership of identity meant that an

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[55] Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (noting that without ability to assign exclusive contracts that barred competitors from using same pictures, celebrities would gain no money from exclusive property right); Nimmer, *supra* note 34, at 209 (citing hypothetical to illustrate that celebrities would lose out if unable to assign exclusive contracts).

[56] Recognition of the right of privacy's shortcomings prompted much discussion for finding a solution. Dissent in *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 171 (5th Cir. 1941), argued for a property right to govern personality right as similar to marks in trade. Brown Chem. Co. v. Meyer, 139 U.S. 540, 544 (1891) (stating that man's name is his own property, and he has right to use and enjoy that name like any other property he owns). An entertainment lawyer, Melville Nimmer, also strongly advocated the right of celebrities under the rubric of right of publicity in a law review article. *See* Nimmer, *supra* note 34, at 204-06. In the article, Nimmer outlined the inadequacies of privacy law, unfair competition, and contracts in providing protection for the personality rights of celebrities. *Id.* He argued that the doctrine of privacy law developed by Warren and Brandeis is outdated and does not meet the needs of the twentieth century. *Id.* at 203-04. Thus, Nimmer urged judicial recognition of an independent personality right based on a property concept, the right "of each person to control and profit from the publicity values which he has created or purchased." *Id.* at 216.

[57] *Haelan*, 202 F.2d at 868.

[58] *Id.* at 867.

[59] *Id.*

[60] *See id.*

[61] *Id.* at 868-69.

[62] *Id.* at 868.

[63] *See Haelan*, 202 F.2d at 868-69.

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individual could prevent commercial use of that identity.[64]

By assigning a property label to a personality right, the *Haelan* court resolved the inadequacies of the right of privacy in protecting public figures.[65] The law no longer confined courts to compensating victims solely on the basis of dignitary harm.[66] Instead, courts recognized the pecuniary interest of an individual's identity as property and focused on the commercial harm resulting from the misappropriation of names and images.[67] Furthermore, the property characteristic of the new right enabled individuals to control the commercial value of their identities through assignments.[68]

Following the seminal *Haelan* decision, many states began to recognize the personality right as an intellectual property right similar to copyright, patent, or trademark.[69] Like these other intellectual property rights, the right of publicity protects an intangible property right such as the expression of ideas rather than tangible objects or real property.[70] Nevertheless, the right of publicity has also forged its own distinct legal identity.[71] Instead of protecting inventions, symbols, or authorships, the new right focused on protecting an individual's identity.[72] The right of publicity establishes a proprietary right in individuals based on the concept that all persons hold an inherent right of ownership over their identities.[73] This right enables individuals to control the extent, manner,

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[64] *See id.* at 868.

[65] MCCARTHY, *supra* note 20, § 1:26.

[66] *Haelan*, 202 F.2d at 868 (recognizing that public figures should receive monetary compensation for authorizing use of their images in advertisements); CRAIG JOYCE ET AL., COPYRIGHT LAW 13 (5th ed. 2001).

[67] JOYCE, *supra* note 66, at 13.

[68] *Id.*

[69] MCCARTHY, *supra* note 20, § 1:8, at 1-8 to -10.

[70] Intellectual property is a body of federal and state laws protecting the property rights of intangible assets. ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, INTELLECTUAL PROPERTY 1 (1996). Federal statutes govern the three main branches of intellectual property rights: copyright, trademark, and patent. *Id.* Copyright protects the property right in "original works of authorship" in artistic and literary expression such as novels, movies, musical compositions, and computer software programs. 17 U.S.C. § 102 (2001); William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, at 1 (forthcoming 2000), *available at* http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/iptheory.html. Trademark law protects the property right in marks that distinguish goods or services from those of others. JOYCE, *supra* note 66, at 2, 4; Fisher, *supra*, at 1. Patent law provides a limited monopoly for new inventions. JOYCE, *supra* note 66, at 2, 4.

[71] MCCARTHY, *supra* note 20, § 1:8, at 1-8 to -10.

[72] *Id.*

[73] *Id.* § 3:1, at 3-2 ("[I]nherent right of every human being to control commercial use of his or her identity."). This right enables "each person to control and profit from the

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and timing of their commercial exploitation and to profit from the value of that identity.[74]

The main focus of the right of publicity is the pecuniary interest in the individual's identity.[75] In granting the right of publicity, courts have recognized that celebrities possess a commercial value in their famed identities.[76] A value exists because celebrities have invested time, effort, and money into creating their famed identities that they can market for monetary compensation.[77] For these reasons, courts have concluded that using another's identity or persona without permission to obtain pecuniary interest amounts to unjust enrichment.[78] An unjust

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publicity values which he has created or purchased." Nimmer, *supra* note 34, at 216.

[74] Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 130 n.14 (1993) (stating that right of publicity recognizes individuals' names and likenesses as property, which carries commercial value that they can exploit and transfer at their discretion).

[75] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575 (1977) (stating that plaintiff holds pecuniary interest in his act); Matthews v. Wozencraft, 15 F.3d 432, 438 (5th Cir. 1994) (focusing on commercial value of celebrities in their names and images); Nimmer, *supra* note 34, at 206 (commenting that celebrity has right to profit from her publicity values).

[76] *See, e.g.*, *Matthews*, 15 F.3d at 438 (recognizing that public figures possess commercial value in endorsing products); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992) (affirming that White possesses famous identity that carries commercial value that she markets to advertisers); Memphis Dev. Found. v. Factors Etc., Inc, 616 F.2d 956, 957 (6th Cir. 1980) ("The famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality.").

Although this Note focuses on celebrities, the right of publicity is not limited to celebrities. It is an "inherent right to *everyone* to control the commercial use of identity." MCCARTHY, *supra* note 20, § 1:3 (emphasis added).

[77] Primary justification for the right of publicity is the Lockean-labor/economic approach. Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 410-11 (1999). This approach argues that celebrities possess a moral right to "reap the fruits" of their labor because they invested tremendous time, effort, and money in creating their famous and marketable identities. *Zacchini*, 433 U.S. at 575 ("[Entertainer's act] is the result of much time, effort, and expense."); Nimmer, *supra* note 34, at 215-16 ("[A] person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money.").

Some argue, however, that fame is not due to labor but sheer luck, investment in public scandal, or by the response of the public. Madow, *supra* note 74, at 179. Regardless of effort or "dumb luck," some courts assert that the law confers a right to the celebrity to control commercial exploitation. *White*, 971 F.2d at 1399.

Other commentators also argue that the labor approach is too narrow and propose a personhood property argument to justify the right of publicity. *See* Haemmerli, *supra*, at 420-21. Under this theory, individuals possess the right to their identities based on freedom and autonomy of the personality. *Id.* at 421. The main focus is not on the pecuniary interest that the person holds in her identity, but on the person as an individual. *Id.* (arguing that law should not separate privacy and publicity protections).

[78] *Zacchini*, 433 U.S. at 575-76; *Matthews*, 15 F.3d at 438-39; Uhlaender v. Henricksen,

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enrichment occurs because the appropriators are benefiting from the famed identity that they did not create.[79]

Having recognized the right of publicity, courts then relied on individual state statutes and common law precedents to define and expand the scope of that right.[80] The Ninth Circuit, in particular, has been active in protecting an individual's identity. The court has extended the right beyond a physical portrait or name to include the celebrity's image, voice, likeness, and persona.[81] For example, the court held that a toilet manufacturer could not use the repertoire phrase "Here's Johnny" in its advertisement because that phrase constituted Johnny Carson's identity.[82] Under the same reasoning, the court enjoined a tobacco company from using a famous racecar driver's car in its commercial because the use infringed on the racecar driver's

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316 F. Supp. 1277, 1282-83 (D. Minn. 1970).

[79] Unjust enrichment means that persons are reaping where they have not sown. *Zacchini*, 433 U.S. at 576. The appropriators are benefiting from the famed identity that they did not create. *Id.* at 577-78. For example, in *Zacchini*, a television news program broadcasted plaintiff's human-cannonball performance without his consent. *Id.* at 564. The plaintiff sought compensation on the theory that the defendant misappropriated his "professional property." *Id.* (quoting plaintiff's appellate brief 4-5). The U.S. Supreme Court upheld plaintiff's contention based on the fact that the news broadcasted plaintiff's *entire act*. *Id.* at 575-76. Because it broadcasted the entire performance, the television news posed an economic threat to the performance that the plaintiff had developed through the investment of his time, effort, and expense. *Id.* at 575-76 (concluding that if people are able to see entire act on television for free, they would not pay to see it in person); *see also* Lugosi v. Universal Pictures, 603 P.2d 425, 441 (Cal. 1979) (Bird, C.J., dissenting) ("When one makes an unauthorized use of another's identity for his own commercial advantage, he is unjustly enriched, having usurped both profit and control of that individual's public image."); Nimmer, *supra* note 34, at 216 ("[E]very person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.").

But some opponents of the right of publicity, such as Michael Madow, argue that the law should not confer more wealth upon celebrities, including athletes, who already receive much profit from their fame. Madow, *supra* note 74, at 137.

[80] *See* MCCARTHY, *supra* note 20, §§ 1:29 to :34 (tracing common law developments of right of publicity from 1950s to 1990s).

[81] *See, e.g.*, *White*, 971 F.2d at 1396 (holding that use of robot wearing blond wig next to wheel of fortune for advertisement constituted misappropriation of Vanna White's persona); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (holding that use of song mimicking Bette Midler's voice violated Midler's right of publicity); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836-37 (6th Cir. 1983) (holding that any intentional, unauthorized, commercial appropriation of attribute that identifies celebrity violates right of publicity). Also, California statute states that "any person who knowingly uses another's name, voice, signature, photograph, or likeness" in an advertisement without consent, is liable for damages. Cal. Civ. Code § 3344(a) (West 2002).

[82] A court held that a toilet manufacturer appropriated Johnny Carson's identity when the company used "Here's Johnny" to market its products because the phrase was exclusively associated with Carson. *Carson*, 698 F.2d at 834. The "Tonight Show" used "Here's Johnny" to introduce Carson at the beginning of each show. *Id.*

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identity.[83] Going further, the court has concluded that the right of publicity includes impersonated voices because a voice is as distinctive as a face.[84] Additionally, the court also found that a mere evocation of a celebrity constitutes a distinctive identity that is protectable under the right of publicity.[85] Thus, the court has expanded on what constitutes identity to grant a property right — right of publicity — to individuals.

As the above discussion demonstrates, the right of publicity emerged from the right of privacy as a proprietary right focused on the economic interest of an individual's identity.[86] The right of privacy recognizes legal injury from the unauthorized use of one's name and image that causes emotional and mental harm.[87] In contrast, the right of publicity recognizes the legal injury that results in the loss of financial gain from the economic value of one's identity by misappropriated use.[88] It is that economic interest that the right of publicity protects.[89] In short, the right of publicity is the right of a person to control the commercial use of his or her identity.

B. Public versus Private Interests

Inherent in the recognition of all property rights is the tension between the desire to grant owners exclusive rights over their property and the desire to balance that right against the public's needs.[90] In the real

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[83] A court held that a famous racecar driver's identity extended to his uniquely marked racecar. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974). Thus, for a tobacco company to use the racecar in its advertisement without the driver's consent violated the driver's right to protect his own identity. *Id.* at 825-26.

[84] Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1112 (9th Cir. 1992) (holding that use of Tom Waits' distinctive style of voice in commercial violated Waits' right of publicity); *Midler*, 849 F.2d at 463.

[85] In *White* the court held that Samsung's advertisement using a robot to depict a game show host, Vanna White, constituted an appropriation of White's identity. 971 F.2d at 1399. The advertisement portrayed the robot with a blond wig appearing in front of the wheel from the "Wheel of Fortune" game show. *Id.* at 1396. Although the advertisement did not specifically mention Vanna White, the court found a violation of the right of publicity on grounds that the advertisement evoked her persona. *Id.* at 1396-98.

[86] *See* Haelen Labs, Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866, 868 (2d Cir. 1953).

[87] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 10, §§ 652A-652I.

[88] *See* MCCARTHY, *supra* note 20, § 2:2.

[89] *See* JOYCE, *supra* note 66, at 13; MCCARTHY, *supra* note 20, § 2:2; *supra* Part I.A.

[90] Under property law, ownership over land entitles the owner to a bundle of rights over the property. DREYFUSS, *supra* note 70, at 2; Thomas Grey, *The Disintegration of Property*, in PROPERTY 69 (J. Roland Permock & John W. Chapman eds., 1980). These rights include the right to possess and use, the right to exclude, the right to transfer, and the right to manage and derive an economic benefit. DREYFUSS, *supra* note 70, at 2. The most fundamental property right is the right to exclude — the right to claim ownership at the

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property context, for example, this tension often emerges in disputes between an owner's right to exclude outsiders and the public's interest in prohibiting discrimination or in encouraging public debate.[91] For intellectual property, this tension is expressed in the competing desire to protect a creator's ownership rights to encourage intellectual creativity without stifling the creativity of others.[92] This section discusses how these competing interests arise in the right of publicity context, particularly their impact on the free speech rights of commercial speakers and on the public domain.

1. The First Amendment and Commercial Speech

Under a right of publicity, celebrities may claim exclusive ownership over the use of their names and images.[93] Other creators, however, seek to use celebrity names and images as part of their expressive message.[94] For example, celebrity plaintiffs assert their property right over their identities and seek to exclude others from appropriating them without consent.[95] In contrast, defendants argue that the Free Speech Clause of

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exclusion of all others. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (noting that one of essential sticks in bundle of property rights is right to exclude). The exercise of this right, however, is not absolute in that it cannot infringe upon the rights of others. *See* Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 87-88 (1980) (holding that right of private owner in shopping center cannot infringe on individual's right to free speech guaranteed under First Amendment); State v. Shack, 277 A.2d 369, 374 (N.J. 1971) (holding that ownership of private property does not include right to bar access to governmental services available for migrant workers).

[91] For example, the public accommodations statute under the Civil Rights Act of 1964 prevents an owner from denying equal access to the public based upon "race, color, religion, or national origin." 42 U.S.C. § 2000a (2001). Also, a private owner of a shopping center cannot exclude others from using the property as a forum for political speech. *See Pruneyard*, 447 U.S. at 87-89.

[92] For example, trademark law deals with balancing the rights of trademark owners and others who wish to use the same or a similar trademark. DREYFUSS, *supra* note 70, at 1. Trademark owners are only granted the right to prevent other trademark uses that are likely to cause consumer confusion. *Id.* In copyright, the law seeks to establish an appropriate balance between protecting creators' rights and ensuring the optimal access to copyright works in order to create more works. *Id.* at 1-2. Thus, copyright protection is limited to the life of the author plus 70 years, or 95 years from publication, or 120 years from creation, whichever expires first. JOYCE, *supra* note 66, at 5. Another limitation is the fair use doctrine. DREYFUSS, *supra* note 70, at 2. Patent law also imposes limitations to protect creators without "unduly sacrificing the interest of the public in enjoying access to their creations." *Id.* Patent protection is limited to 20 years for a utility patent and 14 years for a design patent. *See* JOYCE, *supra* note 66, at 5.

[93] *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 546 (1977); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992).

[94] *See Zacchini*, 433 U.S. at 563-64; *White*, 971 F.2d at 1396-97.

[95] *See, e.g.*, *Zacchini*, 433 U.S. at 564 (arguing that defendant appropriated his property

the First Amendment protects their right to access and use celebrity names and images.[96] Defendants contend that the celebrities' exclusive rights actually violate their right of free speech because it limits their means of expression.[97] Moreover, they charge that the exclusive right contravenes the First Amendment policy of encouraging the dissemination of information to the public.[98] To resolve this tension, courts invoke the commercial speech doctrine.[99]

The U.S. Supreme Court established the commercial speech doctrine based on a distinction between commercial and noncommercial speech.[100] According to the doctrine, the First Amendment accords a higher level of protection to noncommercial speech because it serves an essential service to the public.[101] Noncommercial speech such as the news, stories, and arts disseminates invaluable information to the public and contributes to a marketplace of ideas.[102] In contrast, commercial speech enjoys less constitutional protection because its main purpose is to sell.[103] Commercial speech is defined as something that proposes a commercial transaction.[104] Such a distinction, however, has not always

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right, Zacchini brought suit against television news company); Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249, 1250 (9th Cir. 1997) (claiming that defendant magazine misappropriated his name, likeness, and personality, Eastwood brought action under common law and statutory right of publicity); *White*, 971 F.2d at 1395-96 (asserting that Samsung used plaintiff's image in violation of property right in famed identity, White brought action under California Civil Code section 3344).

[96] *See, e.g.*, Grant v. Esquire, Inc., 367 F. Supp. 876, 878 (S.D.N.Y. 1973) (claiming that their use is protected by First Amendment, defendants argued for dismissal); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802, (Cal. 2001) (arguing that plaintiffs' right of publicity claim violates his right of free speech and expression, defendant raised First Amendment defense).

[97] *Grant*, 367 F. Supp. at 882.

[98] Downing v. Abercrombie & Fitch, 265 F.3d 994, 1002 (9th Cir. 2001) (arguing that photograph illustrates article about surfing and is matter of public interest); *Grant*, 367 F. Supp. at 882 (stating that free speech and freedom of expression are essential for development and growth of society).

[99] *Zacchini*, 433 U.S. at 564-65; *Downing*, 265 F.3d at 1001-02; Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184-86 (9th Cir. 2001).

[100] MCCARTHY, *supra* note 20, § 8:16, at 8-21 to -22.

[101] JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.26 (6th ed. 2000).

[102] News disseminates information about political and social issues that concern the public. *Id.* Stories and the arts contribute to a marketplace of ideas for the public to enjoy. MCCARTHY, *supra* note 20, §§ 8:14 to :15, at 8-19 to -21.

[103] *See* Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1992); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562-63 (1980); White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting) (stating that commercial speech is less protected by First Amendment, but nevertheless protected).

[104] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973); *see* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV.

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been clear.

The Court first established the commercial speech doctrine in 1942 when it held a narrow view that the First Amendment does not protect any speech related to commercial enterprises.[105] In 1976, however, the Court established that commercial speech deserves the same protection as noncommercial speech under the First Amendment because advertising also disseminates information about products to consumers.[106] Nevertheless, four years later, the Court reverted back to the view that the First Amendment entitles commercial speech to a lower level of constitutional protection than noncommercial speech.[107]

In establishing the common law right of publicity, courts have relied on this bright-line commercial–noncommercial distinction. Courts denied plaintiffs' rights of publicity claims if the use constituted noncommercial speech.[108] In contrast, if defendants' unauthorized use of celebrities' names and images amounted to commercial speech, the courts did not hesitate to award remedies.[109]

This bright-line distinction between commercial and noncommercial speech, however, has produced incongruous decisions.[110] One reason for

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627, 637-38 (1990).

[105] *See Valentine*, 316 U.S. at 54-56.

[106] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) ("Advertising . . . is . . . dissemination of information as to who is producing and selling what product, for what reason, and at what price.").

[107] *Central Hudson*, 447 U.S. at 561-63 (holding that Constitution accords lesser protection to commercial speech than to other speech because speech that proposes commercial transaction has been traditionally subject to government regulation). *Central Hudson* established a balancing test that included a four-part analysis, weighing the competing interests between commercial speech and governmental regulation. *Id.* In doing so, *Central Hudson* developed an intermediate scrutiny standard of review for commercial speech. *Id.* at 573 (Blackmun, J. and Brennan, J. concurring). However, the Court has not consistently applied this standard of review for commercial speech. *See generally* 44 Liquormar Inc. v. Rhode Island, 517 U.S. 484 (1996); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[108] *See, e.g.*, Matthews v. Wozencraft, 15 F.3d 432, 437-38 (5th Cir. 1994) (reasoning that plaintiff could not recover under right of publicity because his life story in literary work did not qualify as commercial speech).

[109] *See, e.g.*, White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398-99 (9th Cir. 1992) (reasoning that misappropriation constituted right of publicity infringement because use occurred in context of advertisement, directly implicating commercial interests); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (reasoning that defendants used Midler's distinctive voice in commercial context without consent and thereby committed tort); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) (holding that by using Carson's name in commercial product, defendant infringed on Carson's right of publicity).

[110] *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578-79 (1977)

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the confusion is the breakdown in the distinction between commercial and noncommercial speech. The distinction between commercial speech that sells and noncommercial speech that informs is no longer clear.[111] Oftentimes, advertisements serve multiple functions.[112] An advertisement may convey a message to sell a particular product while at the same time provide consumer information and entertainment to the public.[113] In such amalgamations, advertising may cover a wide spectrum of products and services while concurrently addressing numerous social and political issues.[114] For example, newspapers and magazines do not simply operate to publish news. Rather, their production, distribution, and exhibition function as a large commercial enterprise carried on for private profit.[115]

The blurring of commercial and noncommercial speech has impacted court decisions in right of publicity cases. In *Zacchini v. Scripps-Howard Broadcasting, Inc.*, for example, the U.S. Supreme Court rejected defendant's First Amendment defense even though the use of plaintiff's image occurred in a news program.[116] The Court reasoned that because the defendant broadcasted plaintiff's entire performance without consent, it amounted to unjust enrichment.[117] Similarly, in *Grant v. Esquire, Inc.*, the district court held that *Esquire*'s use of Cary Grant's modified image in its magazine article did not trump Grant's right of publicity.[118] Although the magazine article qualified as a traditional form

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(rejecting defendant's First Amendment defense even though defendant's broadcast of human-cannonball act appeared in noncommercial context of news program); Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001-02 (9th Cir. 2001) (striking down defendant's First Amendment defense even though use of surfers' images appeared in magazine article context); Grant v. Esquire, Inc., 367 F. Supp. 876, 882-83 (S.D.N.Y.1973) (holding that defendant fashion magazine did not possess First Amendment right to use of Cary Grant's modified image in its article even though magazine qualifies as noncommercial context).

[111] *White*, 989 F.2d at 1520 (Kozinski, J., dissenting); NOWAK, *supra* note 101, § 16.29 (noting that political advertising contains political message but also proposes to sell in form of barter transaction).

[112] *See supra* note 111.

[113] *See White*, 989 F.2d at 1520 (Kozinski, J., dissenting) ("Neutral-seeming ads influence people's social and political attitudes, and themselves arouse political controversy."); *supra* note 106.

[114] *White*, 989 F.2d at 1520.

[115] *Id.* at 1520 (noting that magazine publications such as *Spy Magazine* operate for profit); Kozinski & Banner, *supra* note 104, at 637 (noting that newspaper publishing is big business seeking profits).

[116] *See supra* notes 77-79 and accompanying text for further discussion of the case.

[117] Kozinski & Banner, *supra* note 104, at 575-76. *See supra* notes 77-79 and accompanying text for further discussion on unjust enrichment.

[118] Grant v. Esquire, Inc., 367 F. Supp. 876, 881-84 (S.D.N.Y. 1973). Defendant, Esquire

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of noncommercial speech amenable to First Amendment protection, the court rejected *Esquire*'s freedom of expression defense.[119] The court held that *Esquire* used Grant's image to attract attention to its article, which in essence, compelled Grant to contribute his image for free.[120] In a more recent case, *Downing v. Abercrombie*, the Ninth Circuit also rejected defendant's First Amendment defense.[121] Abercrombie published an article recounting the history of surfing and featured pictures of surfers who participated in the 1965 Makaha International Surf Championship in Hawaii.[122] Despite its literary content, the court concluded that Abercrombie's appropriation of the pictures of the surfers amounted to nothing but "window-dressing" to advance a commercial purpose.[123] These cases demonstrate that the courts have struggled to delineate a clear distinction between commercial and noncommercial speech in right of publicity cases.

Such struggle is further complicated by the courts inability to define what constitutes commercial speech.[124] For example, in 1951, the U.S. Supreme Court concluded that a profit motive underlying magazine sales was sufficient grounds for finding commercial speech.[125] Later, the Court found that financial motive was irrelevant in determining commercial speech.[126] In general, while most courts subscribe to the definition that any message that proposes a commercial transaction constitutes commercial speech, courts have yet to establish its specific boundaries.[127]

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magazine, published an article featuring Cary Grant's photograph wearing up-to-date designer fashions. *Id.* at 878. Without Grant's consent, Esquire used the photograph from its 1946 article of Cary Grant and modified the picture by replacing Grant's body with another male model wearing designer clothes. *Id.*

[119] *Id.* at 882-83.

[120] *See id.* at 883 (stating that First Amendment does not absolve publishers from obligation of paying their help).

[121] Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001).

[122] *Id.* at 1000.

[123] *Id.* at 1002.

[124] NOWAK, *supra* note 101, § 16.29.

[125] Breard v. Alexandria, 341 U.S. 622, 641-42 (1951) (upholding ordinance prohibiting unsolicited door-to-door magazine subscription sales because it constituted commercial speech).

[126] New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (refusing to uphold libel action against newspaper for publishing allegedly offensive paid political advertisement because it did not constitute commercial speech and thus qualified for First Amendment protection).

[127] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978); *Breard*, 341 U.S. at 641-42; NOWAK, *supra* note 101, § 16.29.

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2. The Right of Publicity and the Public Domain

The principle aim of all intellectual property law is to balance the exclusive rights of creators and the public's need to access the protected works.[128] In creating new inventions, symbols, technology, and art, creators build upon preexisting works.[129] The law recognizes that such access to preexisting works is necessary to the development of culture, science, and the arts.[130] Likewise, the Constitution empowered Congress to enact statutes to provide the needed balance in intangible property rights by granting limited exclusive rights to authors and creators.[131] This access to prior works lies in the public domain.[132]

In the right of publicity context, the public domain includes celebrities' names, images, and personas.[133] These resources form part of the cultural commodities that the public uses in the progress of cultural development.[134] Cultural commodities include movies, television shows, songs, fashions, and celebrity images.[135] The use of these cultural commodities facilitates cultural pluralism and promotes creativity and innovation in society.[136] Although the dominant culture may attach preferred meanings to cultural commodities, subgroups or marginalized

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[128] Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS. L. REV. 97, 111-12 (1993).

[129] *Id.*

[130] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

[131] U.S. CONST. art I, § 8, cl. 8.

[132] Jessica Litman defines public domain as "a commons that includes those aspects of copyrighted works which copyright does not protect." Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990). Yochai Benkler further comments that "information is in the public domain to the extent that no person has a right to exclude anyone else from using the specified information . . . information is 'in the public domain' if all users are equally privileged to use it." Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 360 (1997). *White*, 989 F.2d at 1516; Pemberton, *supra* note 128, at 111-12.

[133] Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 370-73 (1992). Coombe cites the Marx Brothers and Madonna to illustrate that celebrity images and personas exist in the public domain. *Id.*; *see also White*, 989 F.2d at 1516-17 (Kozinski, J., dissenting) (noting that Vanna White's image and persona is in public domain).

[134] *White*, 989 F.2d at 1513 (Kozinski, J., dissenting) ("Creativity is impossible without a rich public domain."); Coombe, *supra* note 133, at 373 (arguing that celebrity's famed image should remain in public domain for purpose of preserving collective cultural heritage and cultural development); Madow, *supra* note 74, at 134 (asserting that celebrities' image should remain in public domain in order to facilitate popular participation in creating cultural meaning).

[135] Madow, *supra* note 74, at 128, 139-40.

[136] *White*, 989 F.2d at 1514-16; Coombe, *supra* note 133, at 373-75.

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groups can reinterpret and recode cultural commodities to fit their cultural reality.[137] Critics of the right of publicity argue that celebrities' exclusive rights diminish both the public's right to a rich public domain and the free speech rights of commercial speakers.[138] Indeed, in contrast to other property rights, the right of publicity lacks any statutory limitation.[139] The lack of limitation, critics charge, means that the right of publicity fails to balance the competing interests of the property owners and the public.[140] One intellectual property right, copyright, provides a useful analogy of how to achieve this balance.

C. Seeking a Proper Balance: Copyright and the Fair Use Doctrine

The United States Constitution empowers Congress to enact copyright law for the purpose of promoting the public good.[141] To that end, the federal Copyright Act grants exclusive rights to original works of authorship.[142] By granting exclusive rights, the Copyright Act aims to promote the "progress of science and useful arts" and to disseminate creative works to the public.[143]

Exclusive rights, however, both ensure and jeopardize copyright law's purpose. It ensures this goal by protecting the creativity and investment of the copyright holder.[144] This protection provides authors with the incentive to create more works thereby guaranteeing the dissemination of information to the public.[145] Nevertheless, the grant of exclusive rights

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[137] Madow, *supra* note 74, at 140. For example, in the 1950s and 1960s, gay men created a subcultural context for "coming out" by using star images such as Judy Garland, Bette Davis, and Mae West. Coombe, *supra* note 133, at 380.

[138] *See generally* Coombe, *supra* note 133; Madow, *supra* note 74.

[139] *See supra* note 92 and accompanying text.

[140] *White*, 989 F.2d at 1516 (Kozinski, J., dissenting) (asserting that majority panel created broad intellectual property rights without providing limitations).

[141] U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful arts"); Stewart v. Abend, 495 U.S. 207, 228 (1990) (noting that Copyright Act's goal is to disseminate creative works to public); Douglas J. Ellis, Comment, *The Right of Publicity and The First Amendment: A Comment on Why Celebrity Parodies Are Fair Game for Fair Use*, 64 U. CIN. L. REV. 575, 597-98 (1996).

[142] 17 U.S.C. § 102(a) (Supp. 2001) ("Copyright protection subsists. . . in original works of authorship fixed in any tangible medium of expression."); *id.* § 106 ("The owner of copyright under this title has the exclusive rights."). This right enables copyright holders to reproduce and distribute copies of their works, to prepare derivative works based on the original, and to perform or display the work publicly. *Id.*

[143] *See supra* note 141.

[144] JOYCE, *supra* note 66, at 333 ("As reward for [author's] contribution to the storehouse of human knowledge, she receives ownership of a copyright in the work."); Ellis, *supra* note 141, at 597-98.

[145] *See* sources cited *supra* note 144.

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may stifle others' creativity by preventing access to preexisting works.[146] Authors and creators often need access to preexisting works to create their own individualized works.[147] The desire to protect exclusive rights is thus in conflict with the public's need to access preexisting works.

Recognizing the need to balance this tension, the Constitution also mandates that Congress limit the exclusive rights of authors.[148] To that end, Congress included within the Copyright Act statutes limiting the copyright holder's exclusive right.[149] One such limitation is the fair use doctrine.[150] This section discusses the rationale behind the fair use doctrine and its application to right of publicity cases.

1. The Fair Use Doctrine

Under the Copyright Act, the fair use doctrine acts as a balance between public and private interests by limiting copyright monopolies.[151] Using the doctrine, courts weigh the interests of authors' exclusive rights and the public's right to build upon preexisting works.[152] This balancing

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[146] *See* discussion *infra* Part III.C.

[147] Ellis, *supra* note 141, at 598-99; Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) ("There is no such thing as a wholly original thought or invention, each advance stands on building blocks fashioned by prior thinkers."). For example, a rap group, 2 Live Crew, used a preexisting country song to create a parodied rap song. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[148] U.S. CONST. art. I, § 8, cl. 8.

[149] 17 U.S.C. § 107 (Supp. 2001) ("Limitations on exclusive rights: . . . the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching. . . scholarship, or research, is not an infringement of copyright."). This federal statute has also been confirmed in common law precedents. *See generally Campbell*, 510 U.S. 569; Stewart v. Abend, 495 U.S. 207 (1990); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

[150] *See infra* note 186 and accompanying text. This Note advocates applying copyright law's fair use doctrine to right of publicity cases.

[151] *Stewart*, 495 U.S. at 228 ("[T]he Copyright Act . . . creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works."). Fair use is:

a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. To determine whether fair use has been made of copyrighted material, the nature and objects of the selections made, the quantity and value of the material used and the extent to which the use may diminish the value of the original work, must be considered.

Rosemont Enters., Inc. v. Random House, Inc., 256 F. Supp. 55, 65 (D.C.N.Y 1966).

[152] Copyright Act of 1976. 17 U.S.C. § 107 (2001):

Limitations on exclusive rights: . . . In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include – (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and

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test serves as a guideline for courts in determining whether an alleged appropriated use qualifies as a fair use.[153] When properly established, fair use serves as an affirmative defense in copyright infringement actions.[154] If defendants prevail on a fair use defense, they are permitted to use the copyrighted material. Fair use involves balancing four factors: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the potential market effect of the use.[155]

The first factor examines the purpose and character of the use.[156] Purposes that generally lend in favor of fair use include criticism, commentary, news reporting, and scholarship.[157] A finding that a particular use falls within one of these enumerated purposes does not, however, establish the use as presumptively fair.[158] Rather, courts often consider whether the use is transformative and whether the use has commercial or noncommercial purposes.[159] Both elements are important, but the more transformative a work is, the less significant a commercial purpose is in determining whether the work constitutes fair use.[160]

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substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Fair use is an affirmative defense. *Campbell*, 510 U.S. at 590.

[153] *See generally Campbell*, 510 U.S. at 577; *Harper & Row*, 471 U.S. at 560-61.

[154] *Campbell*, 510 U.S. at 590.

[155] 17 U.S.C. § 107; *Harper & Row*, 471 U.S. at 560-61.

[156] 17 U.S.C. § 107(1).

[157] 17 U.S.C. § 107 ("notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright").

[158] *See Campbell*, 510 U.S. at 578-79 (noting that list provides guidance to first factor analysis). Courts are authorized to look beyond the list enumerated in section 107, such as parody. H.R. REP. NO. 102-836, at 3 n.6 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2555.

[159] *Campbell*, 510 U.S. at 578-79. A transformative work alters the original work with new expression, meaning, or message. *Id.* at 579.

[160] *Id.* at 579. A work is transformative if it adds something new to a preexisting product, altering the original work with a new expression, meaning, or message. *Id.* at 578-79. In contrast, a use that merely supersedes or supplants the original by copying a copyrighted work entirely or in part does not qualify as transformative. *See, e.g.*, L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 992-94 (9th Cir. 1998) (holding that unauthorized videotape copies of news programs do not constitute transformative work because nothing new was added — no explanation of footage, no editing, and no editorial comment). The element of transformativeness is important because a transformative work furthers the aim of copyright protection, which is "to promote science and the arts." *Campbell*, 510 U.S. at 579.

In general, a work with a primarily commercial purpose weighs against a finding of fair use.[161] However, a finding of commercial use is not conclusive.[162] For example, in *Campbell v. Acuff-Rose Music, Inc.*, the U.S. Supreme Court concluded that the rap group 2 Live Crew appropriated songwriter Roy Orbison's copyrighted work, *Oh Pretty Woman*, with a commercial purpose.[163] That alone, however, did not presumptively determine unfair use.[164] Rather, the *Campbell* Court examined other factors in the fair use analysis, asserting that the task is not to be simplified with bright-line rules.[165] Thus, a commercial nature or purpose of the work is an important factor but courts will continue to examine the other factors in their evaluation of fair use.

After considering the purpose and character of the use, courts turn to the second factor and examine the nature of the copyrighted work itself.[166] Here, the primary inquiry is whether the original work is fact or fiction.[167] The presumption is that if the original work is primarily factual, it is entitled only to limited copyright protection, whereas a work of fiction obtains extensive protection.[168] Courts recognize that there is a "greater need to disseminate factual works than works of fiction or fantasy."[169] Thus, copying an original work that is creative rather than factual weighs against fair use.[170]

The third factor in the fair use analysis examines the amount and substantiality of the appropriated portion of the original work.[171] Specifically, courts determine whether the quantity and quality of the

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[161] In *Sony Corporation of America v. Universal City Studios*, the Court noted that commercial use is presumptively not fair use. 464 U.S. 417, 451 (1984). In later decisions, the Court clarified that "commerciality" tends to "weigh against a finding of fair use" but is not conclusive. *Campbell*, 510 U.S. at 584-85; Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1984).

[162] *Campbell*, 510 U.S. at 584. Indeed, courts refuse to grant such dispositive weight to any one factor, making all four factors critical in a fair use analysis. *Id.* at 585 (establishing that commercial uses are indicative of unfair use, though such use is not dispositive).

[163] *Id.* at 569.

[164] *Id.* at 582-83.

[165] *Id.* at 577.

[166] 17 U.S.C. § 107(2); *see Campbell*, 510 U.S. at 586; Stewart v. Abend, 495 U.S. 207, 237-38 (1990); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563-64 (1984).

[167] *Campbell*, 510 U.S. at 586

[168] *Id.*; *Stewart*, 495 U.S. at 237-38; *Harper & Row*, 471 U.S. at 563-64.

[169] *Harper & Row*, 471 U.S. at 563.

[170] Copyrighted works that are factual in content and publicly available are more susceptible to a finding of fair use. *Campbell*, 510 U.S. at 586; *Stewart*, 495 U.S. at 237-38; *Harper & Row*, 471 U.S. at 563-64.

[170] *Harper & Row*, 471 U.S. at 563.

[171] 17 U.S.C. § 107(3).

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copied material is reasonable in relation to the purpose of the copied use.[172] For instance, the use of an entire original work may constitute fair use if the defendants establish a legitimate requisite need.[173]

The fourth factor examines the effect of the appropriation on the value or potential market of the original work.[174] The purpose of this factor is to provide protection against uses that impair the economic value of an original work.[175] In making this determination, courts focus on whether the appropriated use adversely impacts the potential and derivative markets of the original work.[176] Courts will find economic harm if the appropriated use interferes with the original work's marketability so as to decrease its sales potential or usurp its place in the market.[177] A transformative use, however, that serves a different market function than the original work favors a finding of fair use.[178]

2. The Fair Use Exception and the Right of Publicity

Despite limitations on other intellectual property rights, the right of publicity exists without any statutory limitations.[179] Nevertheless, courts have strived to balance the need to protect creative investment and facilitate new creative developments in right of publicity disputes.[180] In

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[172] *Campbell*, 510 U.S. at 586-87.

[173] *Id.* at 586-89. For example, the *Campbell* court determined that parody necessarily requires significant appropriation in order to conjure up the original work. Consequently, 2 Live Crew's use of all of the music and most of the lyrics to *Oh Pretty Woman* was reasonable in light of the purpose of the copying. *Id.*

[174] 17 U.S.C. § 107(4).

[175] *Campbell*, 510 U.S. at 590.

[176] *Id.*

[177] *Id.* at 590-92.

[178] *Id.* Accordingly, in *Campbell*, the court concluded that 2 Live Crew's parodied rap version would not likely cause harm to the original song's potential or derivative markets. *Id.* The two songs — one country and one rap — served different markets that were not likely to overlap. *Id.*

[179] While federal statutes govern trademark, copyright, and patents, the right of publicity exists as a right under state statutory law. *See supra* note 70 and accompanying text. The federal statutes impose limitations on copyright, trademark, and patent. *Id.* Without a uniform federal statute, the right of publicity exists without limitations and its scope varies from state to state. Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209, 210-15 (1998) (asserting that lack of uniform federal statute has led to patchwork quilt in right of publicity). Thus, some commentators have proposed that Congress enact a federal statute to regulate the right of publicity. *Id.* (presenting various commentators' views on issue of legislating federal law to govern right of publicity).

[180] *See, e.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (applying fair use exception in right of publicity dispute).

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one case, *Comedy III Productions, Inc. v. Saderup*, the Supreme Court of California successfully employed the fair use doctrine to balance these conflicting interests.[181]

In *Comedy III*, plaintiff filed suit against Saderup for violation of California's right of publicity statute.[182] At issue was Saderup's unauthorized use of a charcoal drawing of the Three Stooges on lithographs and T-shirts.[183] As the registered owner of the exclusive rights to the Three Stooges, Comedy III complained that Saderup's use of the drawing violated its ownership right.[184] Saderup, however, contended that the use qualified under First Amendment protection because the lithographs and T-shirts did not constitute an advertisement, endorsement, or sponsorship of any product.[185]

The Supreme Court of California applied the first element of copyright's fair use doctrine.[186] The court stated that the purpose and character of the use might help to reconcile the conflict between the right of publicity and the First Amendment.[187] Using the transformative element of the fair use exception, the court concluded that Saderup used no significant transformative or creative contribution in making the lithographs or T-shirts.[188] Consequently, Saderup's use amounted to a misappropriation of Comedy III's property interest in the Three Stooges' fame and likeness.[189]

Comedy III illustrates that courts recognize the need to provide a balance in right of publicity disputes.[190] Courts acknowledge that a balance between the exclusive rights of the celebrities and public access to celebrity identities is essential to promote the public good.[191] The

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[181] *Id.*

[182] Plaintiff brought action under California Civil Code section 990. Under this statute, persons are liable if they use a deceased personality or celebrity's name, voice, signature, photograph, or likeness without prior consent from a transferee. CAL. CIV. CODE § 3344 (formerly § 990) (West 2002).

[183] *Comedy III*, 21 P.3d at 800-01.

[184] *Id.*

[185] *Id.* at 801-02.

[186] *Id.*

[187] The court advised against "wholesale importation" of the fair use doctrine into the right of publicity. *Id.* The court concluded those second and third factors, which particularly cater to partial copying of works of authorship, would not be applicable right of publicity. *Id.*

[188] *Id.* at 808-11.

[189] *Comedy III*, 21 P.3d at 811.

[190] *Id.* at 799 ("We formulate . . . what is essentially a balancing test between the First Amendment and the right of publicity.").

[191] *Id.* at 803-06.

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Ninth Circuit also recently recognized this need and attempted to provide a balance.[192]

II. *HOFFMAN V. CAPITAL CITIES, INC.*

In March 1997, Los Angeles Magazine (LAM) published a *Fabulous Hollywood Issue* with an article entitled *"Grand Illusions."*[193] The article used computer technology to alter famous film stills to make it appear that the celebrities were wearing spring fashions by famous designers.[194] The article included sixteen entertainers in famous scenes from movies such as Cary Grant in *North by Northwest*, John Travolta in *Saturday Night Fever*, and Grace Kelly and Jimmy Stewart in *Rear Window*. It also included a photograph of Dustin Hoffman in *Tootsie*.[195]

The original scene from *Tootsie* featured Hoffman posing in front of an American flag wearing a sequined evening dress and high heels.[196] Below the image was the caption, "What do you get when you cross a hopelessly straight, starving actor with a dynamite red sequined dress? You get America's hottest new actress."[197] The article in LAM merged Hoffman's image in the still shot with a male model, replacing Hoffman's body. The new body, with Hoffman's head, wore a silk evening dress designed by Richard Tyler and high-heeled sandals designed by Ralph Lauren.[198] LAM replaced the original caption with one that read, "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."[199] LAM also included a shopping guide page within the issue that listed the stores selling the featured designer fashions. In using Hoffman's altered image in its article, LAM did not seek or obtain Hoffman's consent.[200]

Hoffman brought a right of publicity action against Capital Cities, Inc. and LAM for altering the still shot.[201] Hoffman argued that LAM's action

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

[193] *Id.* at 1183; Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867, 870 (C.D. Cal. 1999).

[194] *See supra* note 193.

[195] *See supra* note 193.

[196] *See supra* note 193.

[197] *See supra* note 193.

[198] *See supra* note 193.

[199] *See supra* note 193.

[200] *Hoffman*, 255 F.3d at 1183; *Hoffman*, 33 F. Supp. 2d at 871. LAM also did not seek or obtain permission from *Tootsie's* copyright holder, Columbia Pictures. *Hoffman*, 33 F. Supp. 2d at 871.

[201] *Hoffman*, 255 F.3d at 1183; *Hoffman*, 33 F. Supp. 2d at 871.

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violated his strict policy of not endorsing commercial products.[202] He feared that endorsing commercial products could send a message to industry executives and to his colleagues that Hoffman could no longer draw audiences and therefore, resorted to advertisements.[203] Contending that LAM's unauthorized use damaged the commercial value of his name and image, Hoffman sought monetary damages.[204] In response to Hoffman's complaint, LAM claimed that its article constituted an editorial opinion entitled to complete protection under the First Amendment.[205] The district court held that LAM violated both Hoffman's common law and statutory right of publicity.[206]

On appeal, the Ninth Circuit reversed the district court's ruling and granted First Amendment protection to LAM.[207] Drawing a distinction between commercial and noncommercial speech, the court concluded that LAM's article amounted to noncommercial speech because it did not qualify as "pure" commercial speech.[208] The court underscored that commercial speech in the right publicity context involved direct advertisements. In such cases, the appropriation of celebrities' names

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[202] *Hoffman*, 33 F. Supp. 2d at 870. He feared that his appearance in advertisements would threaten his serious and highly successful motion-picture acting career. *See id.*

[203] *Id.*

[204] *Hoffman*, 255 F.3d at 1183; *Hoffman*, 33 F. Supp. 2d at 871.

[205] *Hoffman*, 255 F.3d at 1183-84; *Hoffman*, 33 F. Supp. 2d at 874.

[206] *Hoffman*, 33 F. Supp. 2d at 873. The court concluded that LAM violated the common law of right of publicity because LAM used Hoffman's name and likeness without consent in order to sell magazines. *Id.* As a result, Hoffman suffered injury and damage in that he was "unable to reap the commercial value or control the use" of his name and likeness. *Id.* The court also concluded that LAM violated the statutory right of publicity because the magazine "knowingly used" Hoffman's name and likeness without consent to advertise, sell, or solicit purchases of products. *Id.* at 873-74.

The court noted that LAM made no efforts to contact Hoffman to obtain his permission when, based on the magazine's prior practices, LAM knew or should have known that celebrities are sensitive of their portrayal in the public. *Id.* 871-72. For example, in the March and October 1996 issues of the magazine, LAM obtained prior consent from Grammy-nominated singers and television comedians before featuring them in their articles. *Id.* LAM knew that the celebrities would not consent or would demand payment for the use of their photographs. *Id.* at 872. Moreover, the court found that the article amounted to commercial speech because it did not provide commentary on current fashion. *Id.* at 874-75. Rather, Hoffman's photographs only served to attract attention to the magazine. *Id.* at 875. Based on these factual findings, the court concluded that LAM's use of Hoffman's photograph without his consent constituted exploitative commercial use. *Id.* at 873 ("[T]he photographs were manipulated and cannibalized to such an extent that the celebrities were commercially exploited and were robbed of their dignity, professionalism and talent.").

[207] *Hoffman*, 255 F.3d at 1188.

[208] *Id.* at 1185.

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and images occurred in the context of selling the defendants' products.[209]

In the *Hoffman* case, however, the court emphasized that no such direct advertisement was associated with the appropriation.[210] LAM's article did not solely propose a commercial transaction.[211] Though the photograph featured designer clothes, the designers did not fund the article as an advertisement.[212] Instead, LAM's article constituted an editorial opinion about Hollywood; a feature story within an issue that focused on Hollywood, past and present.[213] In that context, the article did not simply advance a commercial message, but complemented the issue's editorial on Hollywood by providing humor, fashion photography, and comments on classic films and famous actors.[214] Consequently, the article constituted protected speech under the First Amendment.

III. ANALYSIS

The court in *Hoffman* attempted to establish a standard for reconciling the competing claims between public and private interests.[215] Unfortunately, the court relied on the commercial–noncommercial speech distinction, ignoring the confusion and inconsistencies inherent in the commercial speech doctrine.[216] In doing so, the court failed to resolve the tension between the right of publicity and free speech protection.[217] The court did not provide a standard for cases involving an amalgamation of commercial speech and noncommercial speech in advertisements.[218] Instead, the court simply stated that the LAM article did not amount to an advertisement as a matter of "common sense."[219] It failed to provide a clear precedent that future courts, celebrities, and the public could follow. Without a clear precedent, courts will continue to render inconsistent decisions that result in illusory guidelines of what

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[209] *Id.* (noting that traditional advertisements aim to sell particular products).

[210] *Id.* at 1185-86.

[211] *Id.*

[212] *Id.* at 1185 ("LAM did not receive any consideration from the designers for featuring their clothing.").

[213] *Hoffman*, 255 F.3d at 1185.

[214] *Id.*

[215] *See supra* Part I.B.1.

[216] *Hoffman*, 255 F.3d at 1184-86; *see supra* Part I.B.1.

[217] *See supra* Part I.B.1.

[218] *See infra* Part III.A.

[219] *Hoffman*, 255 F.3d at 1186 ("[C]ommon sense tells us this is not a simple advertisement").

constitutes protection and infringement.

This section argues that relying on the commercial–noncommercial speech distinction creates inconsistent results. The distinction also fails to provide clear protection to celebrities and adequate guidance to those who use their images. A better approach is to limit the right of publicity by adopting copyright law's fair use doctrine.[220] Adopting fair use will both protect a creator's investment and promote new creative ventures.[221] It will also ensure that First Amendment protection applies equally to commercial speech that meets the fair use balancing test.[222] Moreover, limiting the right of publicity will ensure a rich public domain and contribute to creativity.

A. Reliance on the Commercial–Noncommercial Speech Distinction Promotes Confusion

Applying the commercial–noncommercial distinction, the *Hoffman* court ignored the inherent inconsistency and confusion within the commercial speech doctrine. The court failed to appreciate that a clear definition of commercial speech does not exist.[223] The court also disregarded the irrelevancy of the bright-line distinction in light of the multifaceted role that advertisements play in today's media environment.[224] By ignoring these factors, the *Hoffman* court perpetuated a distinction that has little utility in modern society.

The Ninth Circuit based its bright-line approach on an inconsistent commercial speech doctrine.[225] Although many courts subscribe to the view that commercial speech occupies a lower level of First Amendment protection, this view is not dispositive.[226] The U.S. Supreme Court has

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[220] Several commentators have suggested that the right of publicity should adopt the fair use doctrine. *See, e.g.*, Ellis, *supra* note 141, at 612-15 (arguing that modified fair use analysis of parody defense protects both celebrity's publicity rights and parodist's First Amendment rights); Pemberton, *supra* note 132, at 133-39 (advocating parody exception to right of publicity similar to parody exception in copyright and trademark); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 915 (1983) (proposing modified version of fair use doctrine).

[221] *See supra* note 217; *infra* Part III.C.

[222] *See supra* note 217; *infra* Part III.B.

[223] *See supra* Part I.B.1.

[224] *See supra* Part I.B.1; *supra* note 111.

[225] *See supra* Part I.B.1.

[226] *See supra* Part I.B.1; *see, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) (holding that First Amendment entitles commercial speech to lower level of protection); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (establishing that commercial speech

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yet to delineate the degree of First Amendment protection accorded to commercial speech.[227] Moreover, the Supreme Court has not reached any succinct definition on what constitutes commercial speech.[228] For example, the Supreme Court found a profit motive underlying magazine sales as sufficient grounds for commercial speech.[229] In another instance, the Court found such motive irrelevant in determining commercial speech.[230] Such inconsistent holdings within the commercial speech doctrine ought not be applied to a bright-line distinction. Yet the *Hoffman* court did just that and failed to establish a sound body of law.

Furthermore, the *Hoffman* court ignored the irrelevancy of the bright-line distinction in today's media environment. In today's society, the distinction between commercial and noncommercial speech has blurred to the extent that it no longer exists.[231] An advertisement may convey a message to sell and at the same time provide consumer information.[232] An editorial may contain an indirect message to sell.[233] Judge Kozinski, in a law review article, noted that a new term, "advertorials" has been coined to describe this type of speech that combines editorials and advertisements.[234] A magazine may paste a set of complimentary brand-name lipstick and eye shadow samples on its editorial pages about cosmetics.[235] For these reasons, Judge Kozinski argued that the distinction between noncommercial–commercial speech "makes no

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deserves equal protection under First Amendment); Valentine v. Chrestensen, 316 U.S. 52, 54-56 (1942) (concluding that First Amendment does not accord any protection to commercial speech). *See also* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting) (stating that commercial speech is less protected by First Amendment, but nevertheless protected).

[227] *Hoffman*, 255 F.3d at 1184 ("[T]he boundary between commercial and noncommercial speech has yet to be clearly delineated."); *see supra* Part I.B.1.

[228] *See supra* Part I.B.1. The standard of review for commercial speech is also in a state of flux. *See supra* note 107.

[229] Breard v. Alexandria, 341 U.S. 622, 625-26 (1951) (upholding ordinance prohibiting unsolicited door-to-door magazine subscription sales because it constituted commercial speech); *see supra* Part I.B.1.

[230] New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (refusing to uphold libel action against newspaper for publishing allegedly offensive paid political advertisement because it did not constitute commercial speech and thus qualified under First Amendment protection); *see supra* Part I.B.1.

[231] *White*, 989 F.2d at 1520; *see supra* Part I.B.1.

[232] *See White*, 989 F.2d at 1520 n.30.

[233] Tara Parker-Pope & Wendy Bounds, Editorial, *Publishing: Smudging Line Between Ads*, WALL ST. J., Apr. 19, 1999, at B1.

[234] Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 643 (1990).

[235] *Id.*

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sense."[236]

Given the role and scope of advertisements in modern media, it makes no sense to apply such an obsolete distinction. When courts attempted to subscribe to the traditional distinction, it only led to inconsistencies.[237] For example, in *Zacchini*, the Supreme Court found a right of publicity infringement even in a news context.[238] In *Grant* and *Downing*, the right of publicity trumped the magazines' free speech rights.[239] Such inconsistent decisions render the commercial and noncommercial speech distinction meaningless.

Yet, the *Hoffman* court ignored this reality and applied a bright-line distinction.[240] The court denied Hoffman's right of publicity because it concluded that LAM's article did not constitute pure commercial speech.[241] The article did not amount to a direct advertisement because it did not propose a commercial transaction and the featured designers did not financially endorse the article.[242] The court, however, ignored the magazine's profit motive and the shopping guide provided in the magazine.[243]

The *Hoffman* decision only compounds the problem by continuing to perpetuate an inconsistent body of law.[244] Without a clear precedent, the courts will continue to render inconsistent decisions in right of publicity disputes.[245] Such inconsistent decisions will result in unclear and illusory boundaries of protection for celebrities.[246] Celebrities seeking protection will have to depend on each new court's decision to determine the scope and limitations of their right of publicity.[247] Similarly, those desiring to

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[236] *Id.* at 628.

[237] *See supra* Part I.B.1 for discussion of courts' holdings in *Zacchini*, *Grant*, and *Downing*.

[238] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 564 (1977).

[239] Downing v. Abercrombie & Fitch, 265 F.3d 994, 996-97 (9th Cir. 2001); Grant v. Esquire, Inc., 367 F. Supp. 876, 878-79 (S.D.N.Y. 1973).

[240] Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184-86 (9th Cir. 2001).

[241] *Id.* at 1185.

[242] *Id.* at 1185-86.

[243] Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867, 870 (C.D. Cal. 1999).

[244] *See supra* Part I.B.1 and note 110 for discussion of courts' holdings in *Zacchini*, *Grant*, and *Downing*.

[245] *See supra* Part I.B.1. and note 110 for discussion of courts' holdings in *Zacchini*, *Grant*, and *Downing*. In *Zacchini*, *Grant*, and *Downing*, the courts granted plaintiff's right of publicity even though the use of their images occurred in a noncommercial context.

[246] At different times, the U.S. Supreme Court has reached different holdings on what constitutes commercial speech. *See supra* Part I.B.1 and note 110 for discussion of courts' holdings in *Zacchini*, *Grant*, and *Downing*.

[247] In *White v. Samsung Electronics America, Inc.*, the court drew a bright-line distinction and held that defendant's use amounted to infringement solely because it was in a

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use celebrity images will not be able to determine from existing precedent whether a particular use will constitute infringement.[248] Some courts will apply the bright-line distinction while other courts will ignore it altogether.[249] This lack of guidance will mean that the courts will allow others to infringe on a celebrity's right of publicity even when it is in a noncommercial context.[250]

Thus, instead of an obsolete and inconsistent doctrine, the courts should rely on a balancing test, such as copyright law's fair use exception. Fair use analysis will free the courts from depending on an illusory distinction.[251] The California Supreme Court has already demonstrated that fair use is more applicable in today's society than the commercial-noncommercial distinction.[252] By providing a balancing analysis, fair use will provide the guidelines necessary to establish a succinct body of law in the right of publicity.[253]

B. Fair Use Will Ensure First Amendment Protection

Unlike other intellectual property rights, the right of publicity exists without any statutory limitations.[254] In the absence of federal statutes guiding the right of publicity, courts have expanded the scope of the

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commercial context. 971 F.2d 1395, 1397-99 (9th Cir. 1992). The court in *Grant v. Esquire,* however, ignored the distinction altogether and found infringement even in a noncommercial context. 367 F. Supp. 876, 885 (S.D.N.Y. 1973). *See supra* Part I.B.1 and note 110 for further discussion of cases where right of publicity was granted in a noncommercial context.

[248] *See supra.*

[249] *See supra* note 247.

[250] *See, e.g.,* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (finding right of publicity infringement in news context); Downing v. Abercrombie & Fitch, 265 F.3d 994, 1002 (9th Cir. 2001) (concluding that defendant violated plaintiffs' right of publicity even though use occurred in fashion magazine); *Grant,* 367 F. Supp. at 879 (holding that defendant infringed on celebrity's right of publicity even though use occurred in magazine).

[251] Some courts have demonstrated that the right of publicity can adopt the fair use doctrine to ensure a balance between exclusive rights and the First Amendment. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802, (Cal. 2001); *see also supra* Part I.C.2 for discussion on the case.

[252] The U.S. Supreme Court impliedly affirmed the California Supreme Court's application of the fair use doctrine in the right of publicity case, *Comedy III Productions,* by denying defendant's appeal. Saderup v. Comedy III Prods., Inc., 534 U.S. 1078 (2002); Harriet Chiang, *Soitenly, Three Stooges' Heirs Have Right to Control Merchandising,* S.F. CHRON., Jan. 8, 2002, at A3.

[253] *See supra* Part I.C.1.

[254] *See supra* note 180 and accompanying text.

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right of publicity without imposing any concrete limitations.[255] Such unlimited expansion allows celebrities to claim property rights in their images and to suppress the speech rights of others by withholding consent.[256] Consequently, this infringes upon the rights of both commercial and noncommercial speakers.[257]

Without a clear distinction between commercial and noncommercial speech in today's society, celebrities' absolute rights over their images can infringe on speakers in any context.[258] Indeed, noncommercial speakers are not exempt from such infringements.[259] Celebrities have prevailed in right of publicity claims against traditional noncommercial speakers such as news broadcasts or magazines.[260] Thus, bright-line distinctions do not ensure First Amendment protection to noncommercial speakers.

The commercial-noncommercial distinction has blurred to such an extent that there is no rein on celebrities' control over their images.[261] For example, a celebrity can stop an advertiser from even suggesting her image under the right of publicity.[262] Such control ignores the fundamental concept that property rights, including intellectual property rights, are about balance.[263] Without a proper balance, the right of publicity infringes on other people's right of expression and allows

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[255] Under common law precedents, courts held that impersonated voices, associated phrases, associated racecar, and even an evocation of an image constitutes protectable identity. See *supra* Part I.A. for further discussion and notes 81-85 and accompanying notes.

[256] In *White v. Samsung*, Vanna White withheld consent from allowing Samsung to use a robot that evoked her image. *See* 971 F.2d 1395 (9th Cir. 1992). In *Midler v. Ford Motor*, celebrity singer, Bette Midler, did not allow Ford to use an impersonated voice to market its products. *See* 849 F.2d 460 (9th Cir. 1988). In *Carson v. Here's Johnny Portable Toilets*, Johnny Carson prevented a manufacturer from using his name to market products. *See* 698 F.2d 831 (6th Cir. 1983).

[257] *See supra* Part I.B.1.

[258] *See supra* Part I.B.1.

[259] *See supra* note 250 and accompanying text.

[260] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); Downing v. Abercrombie & Fitch, 265 F.3d 994, 1002 (9th Cir. 2001); Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973). News accounts involving factual information, however, qualify under First Amendment protection. *See, e.g.*, Rosemont Enter., Inc. v. Random House, Inc., N.Y.S.2d 122 (N.Y. Sup. Ct. 1968), *aff'd* 32 A.D. 2d 892 (N.Y. App. Div. 1969) (holding that unauthorized biography did not infringe on Howard Hughes' right of publicity because content accounted facts of Hughes' life).

[261] *White*, 989 F.2d at 1514-16; *see supra* Part I.B.1.

[262] *White*, 989 F.2d at 1516.

[263] *Id.* ("[I]ntellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us.").

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celebrities to have despotic dominion over their images.[264]

A better approach is to adopt the fair use exception, which will prevent celebrities from unreasonably restricting the free speech rights of others.[265] By applying fair use, courts can eliminate this potential infringement on the First Amendment right regardless of the type of speech involved.[266] The fair use doctrine does not solely rest its determination on the question of commerciality alone.[267] Rather, fair use enables courts to consider other factors that transcend the bright-line commercial–noncommercial distinction.[268]

Indeed, the California Supreme Court has successfully demonstrated that fair use is applicable in right of publicity disputes.[269] If the *Hoffman* court had followed such an example, it would have looked beyond the traditional distinction.[270] As in *Comedy III*, the transformative element under the purpose and character of the use would predominate in the *Hoffman* analysis.[271] LAM's article featured Hoffman's photo still from *Tootsie* but incorporated its own message and meaning by altering the image.[272] The strong transformative element in *Hoffman* would render the commercial purpose insignificant.[273] Based on such a finding, the court would most likely hold that the article constituted fair use.

Although the application of fair use would have probably yielded the same result, it would have provided more guidance for other creators and users of celebrity images.[274] In applying a balancing test, fair use

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[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] The fair use doctrine is a balancing test that involves four-factors. 17 U.S.C. § 107; *see supra* Part I.C.1.

[268] *See supra* Part I.C.1.

[269] *See supra* Part I.C.2.

[270] *See supra* Part I.C.2.

[271] In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the court advised against "wholesale importation" of the fair use doctrine into the right of publicity. 21 P.3d 797, 807 (Cal. 2001). The court concluded that the second and third factors, which particularly cater to partial copying of works of authorship, would not be applicable to a right of publicity analysis. *Id.* at 807-08.

[272] *See supra* Part II.

[273] The other factors relate to the original work and would not be applicable to the *Hoffman* case. The original work in this case, the Tootsie character, belongs to Columbia Pictures and not to Hoffman. Thus similar to analysis in *Comedy III*, examining the "nature of the copied work," "the substantiality of the portion used in relation to the copyrighted work as a whole," and "the potential market effect of the use" would not be advisable. *See* note 271 and accompanying notes.

[274] For example, even if the Ninth Circuit had concluded that LAM's article constituted commercial speech, application of the fair use exception would allow LAM to prevail. The

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determination provides the scope and limitations absent in the right of publicity.[275] Although fair use may result in subjective content-based rulings, it provides concrete factors that courts can apply to different facts.[276] Thus, regardless of the type of speech, such guidance provides more First Amendment protection because it extends beyond the commercial–noncommercial distinction.[277]

Opponents to the adoption of fair use, however, argue that its use would afford commercial speakers the same level of First Amendment protection as noncommercial speakers.[278] Courts would award protection to commercial speakers if courts find fair use.[279] Such a result is problematic because commercial speech is not generally entitled to the same protection as noncommercial speech.[280] Opponents argue that an extension of free speech protection to commercial speakers would actually violate the spirit of the First Amendment, which is to promote the full exchange of ideas and to ensure a vibrant political marketplace of ideas.[281] Commercial speech falls outside this protection because it does not inform the public.[282] Rather, it is driven by a desire to solicit buyers to its products, and thus First Amendment protection is properly withheld from commercial speakers.[283]

Such an argument, however, ignores the fact that the commercial–noncommercial distinction no longer makes sense in today's media

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transformative element under the first factor would predominate. *See supra* Part. I.C.1. LAM's article featured Hoffman's photo still from *Tootsie* but incorporated its own message and meaning by altering the image. Hoffman v. Capital Cities/ABC Inc., 255 F.3d 1180, 1183 (9th Cir. 2001). With the application of computer technology, LAM added something innovative and original to the photo still. *Id.* Although other factors would play a part, this would weigh heavily in the court finding fair use.

[275] *See supra* Part I.C.1.

[276] *See* MCCARTHY, *supra* note 20, § 6.25 (stating that fair use is subjective and not reliable because it is based on case-by-case analysis).

[277] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 573 (1994) (balancing four factors to determine fair use); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802, (Cal. 2001) (applying balancing test focusing on transformatives to determine fair use); *see supra* Part I.C.1.

[278] *Cf.* Grant v. Esquire, Inc., 367 F. Supp. 876, 884 (S.D.N.Y. 1973) (stating that awarding First Amendment protection to appropriations in commercial context would convert celebrities into unpaid professionals).

[279] *Cf. id.*

[280] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); NOWAK, *supra* note 101, § 16.26; *see supra* Part I.B.1.

[281] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1519-20 (9th Cir. 1993); *Grant*, 367 F. Supp. at 882-83.

[282] Valentine v. Chrestensen, 316 U.S. 52, 53-54 (1942); *see supra* Part I.B.1.

[283] *Valentine*, 316 U.S. at 54; *see supra* Part I.B.1.

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environment.[284] Traditional commercial speech, such as advertising, no longer confines itself to simply proposing a commercial transaction.[285] Instead, advertisements often include information and entertainment that benefits society in addition to a commercial message.[286] Advertisements also deal with a wide spectrum of social and political issues that may influence the public.[287] Furthermore, noncommercial speakers such as newspapers, magazines, and television news programs do not simply operate to disseminate information.[288] Rather, production, distribution, and exhibition function as a large commercial enterprise carried on for private profit. In light of these considerations, the characteristics that defined the commercial–noncommercial distinction no longer exist. Rather, commercial and noncommercial speech have intermingled with one another to an extent that it is difficult for courts to determine which speech should be entitled to First Amendment protection.[289]

C. *Fair Use Will Ensure a Rich Public Domain*

A rich public domain serves an important function in cultural and societal development.[290] It provides resources for authors, creators, artists, and scientists with which to produce new works. In essence, the public domain allows creators to engage in derivative works, and the richer the public domain, the more resources for the public. To that end, celebrities play an important role because their names, images, and personas form parts of these resources.[291] The right of publicity, however, can impoverish the public domain because the right grants exclusive control to celebrities.[292]

Cultural commodities of celebrity names, images, and personas promote creativity and pluralism in society.[293] All expressions are

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[284] *See supra* Part I.B.1.

[285] *See supra* Part I.B.1.

[286] Tara Parker-Pope & Wendy Bounds, *Publishing: Smudging Line Between Ads, Editorial*, WALL ST. J., Apr. 19, 1999, at B1 ("[B]lurring line between editorial copy and advertising is hardly new in beauty and fashion magazines."); *see supra* Part I.B.1.

[287] *See supra* Part I.B.1.

[288] *See supra* Part I.B.1.

[289] *See supra* Part I.B.1.

[290] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski. J., dissenting) (asserting that rich public domain stimulates flourishing of our culture).

[291] *Id.*

[292] *Id.*

[293] *Id.*

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derivative works because nothing is completely new or original.[294] Creators build upon the works of those who came before by referring to it, commenting on it, and satirizing it.[295] Although not completely original, such derivative works, in turn, contribute to the richness of the public domain because they supply more resources for others to use.[296] Without such resources, the free development of our national culture would cease to exist.[297] Parody and humor are vital components of the marketplace of ideas that draw upon the resources of the public domain.[298] Furthermore, without a rich public domain, individuals and groups would possess limited means of expressing their creativity.[299] Subgroups would have limited resources with which they could reinterpret and express their presence in the dominant culture.[300] Thus, to ensure a thriving cultural and societal development, the law should refrain from limiting any expressions.[301]

The traditional distinction between commercial and noncommercial speech in the right of publicity jeopardizes a rich public domain. Creative expressions are not limited to noncommercial speech.[302] For example, parodies and humor are prominent in advertisements.[303] Under the traditional distinction, celebrities can invoke the right of publicity and prevent the use of their images in any commercial context.[304] As long as the appropriated use constitutes commercial

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[294] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 573 (1994) (noting that everything in creation production is borrowed); *White*, 989 F.2d at 1513 ("Nothing new today, likely nothing since we tamed fire, is genuinely new."); Madow, *supra* note 74, at 196 (stating that everything is essentially borrowed because all creations involve reworking, recombining, and redeploying already-existing symbolic forms).

[295] *White*, 989 F.2d at 1513-14 ("Culture . . . grows by accretion, each new creator building on the works of those who came before.").

[296] *Id.* at 1513 ("Creativity is impossible without a rich public domain.").

[297] *Id.* at 1513-14, 1516 (asserting that preventing public from using celebrity images to mock them or their work would make world poorer culturally and economically).

[298] *Id.* at 1516.

[299] *See supra* Part I.B.2.

[300] *See supra* Part I.B.2.

[301] *White*, 989 F.2d at 1516. Public can use resources within the public domain without worrying about misappropriation liability if celebrities have no right to control information in the public domain. Matthews v. Wozencraft, 15 F.3d 432, 440 (5th Cir. 1994) ("Liability for misappropriation also will not arise when the information in question is in the public domain, for the public figure no longer has the right to control the dissemination of the information.").

[302] *See White*, 989 F.2d at 1514-17 (arguing that defendant's use of White's image in advertisement amounted to parody).

[303] *Id.*

[304] Madow, *supra* note 74, at 130 (stating that while life stories of celebrity images are

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speech, celebrities will possess the right to unreasonably burden creativity and prevent others from using their images in a derivative fashion.[305] Strict adherence to the bright-line approach, based on such a distinction, will deplete the public domain. Consequently, to impoverish the public domain stifles the creativity for new works, thereby restricting cultural development.[306]

In contrast to the traditional distinction, application of the fair use doctrine in the right of publicity will ensure a rich public domain.[307] Under fair use, the commercial and noncommercial distinction would no longer be the only determining factor.[308] Even if the creators engaged in the misappropriation of a celebrity's image in a commercial context, the court can award fair use based on the four-factor test.[309] Thus, the balancing test offers a more complete analysis of the facts, interests, and consequences involved in the use.[310] This will free up the creative process because fair use enables new creative expressions without the burden of seeking authorization.[311] Under the fair use exception, courts will look beyond commercial value because the aim is to balance the interests between the right of publicity and the public interests.[312]

Proponents of the right of publicity, however, argue that exclusive rights will not deplete the public domain if creators are willing to pay compensation.[313] Celebrities who have invested time, effort, and money

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common property, star images in advertisements are privately held).

[305] *See, e.g., White*, 989 F.2d at 1397 (granting right of publicity to White because use occurred in commercial context and consequently prevented defendant from using White's image as form of parody). Judge Kozinski in dissent argued that the panel ignored the detrimental effects of granting exclusive rights to White. *Id.* at 1514-16. The majority panel disregarded the balance that exists in intellectual property rights to ensure a rich public domain. *Id. See also* Madow, *supra* note 74, at 137 (asserting that granting exclusive right under right of publicity facilitates private censorship of popular culture).

[306] *Id.* at 1516. Professor Madow asserted that prohibiting a non-profit gay rights organization from using the word "Olympics" in their gay athletic competition deprived them of their creativity and representation of their subculture. Madow, *supra* note 74, at 142 (commenting on *San Francisco & Athletics, Inc., v. United States Olympic Committee*, 483 U.S. 522 (1987)).

[307] *See supra* Part I.C.1.

[308] *See supra* Part I.C.1. (explaining that fair use examines other factors in addition to commerciality of use).

[309] *See supra* Part I.C.1.

[310] Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992) (granting fair use for appropriation even though use occurred in commercial context); *see supra* Part I.C.1.

[311] *White*, 989 F.2d at 1516 (noting that by awarding exclusive rights to celebrities, public domain is impoverished and forces creators to seek authorizations for use).

[312] *See supra* Part I.C.1.

[313] Grant v. Esquire, Inc., 367 F. Supp. 876, 883 (S.D.N.Y. 1973) (equating use of celebrities' images without compensation to painter walking into paint supply store and

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into establishing their famed identities should own the fruits of their labor.[314] Supporters argue that celebrities are entitled to any commercial gain of their famed identity.[315] Therefore, subgroups and individuals desiring to appropriate a name or image for creative works or representations should compensate the celebrities.[316] It should not come at the expense of individuals and their property right in identities.

This argument ignores the fact that requiring consent or payment still holds resources for public domain hostage. Celebrities will still exercise exclusive control because they will decide whether or not to sell their identities.[317] If the price is not right, a celebrity can decide to withhold granting that right or can refuse to ever grant that right, regardless of the price.[318] If a group wants to use a celebrity's name or image to represent a group that the celebrity does not care for, the celebrity may decide to disallow such use.[319] Again, the public domain will be at the mercy of celebrities who want exclusive control in the timing, manner, and extent of names and images in the public.[320]

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helping himself to materials without paying for them). Professor Madow, however, argues that the right of publicity "redistributes wealth *upwards*." Madow, *supra* note 74, at 136-37 (emphasis in original). He argues that conferring such right adds additional wealth to those who are already "handsomely" paid for their famed identities. *Id.* Thus, he argues that instead of funneling more money to celebrities, their images should be a common asset for everyone to use. *Id.* at 137.

[314] Based on the Lockean labor theory, proponents argue that the law should protect the celebrities' investment into creating their famed identity. Nimmer, *supra* note 34, at 215-16. Such protection provides incentives for others to create unique identities and performances. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) ("[P]rotection provides an economic incentive for [plaintiff] to make the investment required to produce a performance of interest to the public."); Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) (stating that protecting against misappropriation benefits public because it encourages people to develop special skills); *see supra* Part I.A.3.

[315] Nimmer, *supra* note 34, at 206; *see supra* note 48 and accompanying text; *cf.* Madow, *supra* note 74, at 129 (noting that celebrity images carry commercial value in advertisements because it enhances marketability of wide array of collateral products and services).

[316] *Grant*, 367 F. Supp. at 883 (noting that there would be no shortage of celebrities who would lend their images for appropriate fee); *see supra* Part I B.2. Madow, however, argues that depending on celebrities to distribute their images based on monetary compensation can also leave out small groups who cannot afford to compete with wealthy advertisers. Madow, *supra* note 74, at 223-24.

[317] Madow, *supra* note 74, at 146 (stating that power to license under exclusive rights is power to suppress circulation of meaning and identity in our society).

[318] *Id.* at 223-24 (asserting that celebrities will grant licenses to those who can pay most money).

[319] *Id.* at 145-46 ("[I]f [celebrity] so chooses, she [can] suppress readings or appropriations of her persona that depart from, challenge, or subvert the meaning she prefers.").

[320] *Id.*

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CONCLUSION

The right of publicity arose from the right of privacy without considering the competing public and private interests. Instead, it grew as a way to address a singular need — to grant a proprietary right to individuals for commercial exploitation of identities. However, granting an exclusive right to individuals, especially celebrities, comes at the expense of depleting the public domain. The right has also produced an inconsistent body of law. The courts need to address this problem by incorporating a system of balance in order to weigh the different interests. Without uniform statutory guidance, one promising option is to adopt the fair use doctrine. The fair use exception will enable courts to extend beyond the obsolete commercial–noncommercial distinction to establish a sound body of law in the right of publicity.

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