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I. INTRODUCTION

A person who runs for, or holds, political office does not forfeit his property rights. His house is not suddenly taken away, his bank accounts are not seized, and his right to control the *commercial use* of his identity—also a property right[1]—does not disappear. When Arnold Schwarzenegger announced his intent to run for governor of California on August 6, 2003 during The Tonight Show with Jay Leno, and when he was elected on October 7, 2003, he did not give up his property rights, including his right to control the commercial use of his name, image and identity.

Before August 2003, when Schwarzenegger was a "non-politician," no one disputed his right to control the commercial use of his highly valuable name and image. If a company, without permission, used his image in an advertisement, or manufactured and sold a product bearing his name, image or even a sound-alike of his voice, Schwarzenegger was entitled to stop the infringement pursuant to his rights of publicity, and to seek compensation for the commercial value of the misappropriation. Schwarzenegger enforced those rights vigorously. Now that he has entered politics, those rights remain, and his commitment to protecting against the unau-

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1. "The right of publicity, like copyright, protects a form of intellectual property . . . ." Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001); *see also* Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108, 1115 (D. Az. 2000) (right of publicity is considered a property right).

thorized commercial use of his name and image continues.

For the reasons discussed below,[2] Arnold Schwarzenegger, and for that matter any politician, has the same right to control the commercial use of his name, image and identity as does any other person, whether a motion picture or television star, recording artist, sports figure, celebrity by some other means, or even a non-celebrity. The law distinguishes between legitimate uses of a person's name, image and identity that constitute a valid exercise of free expression, and commercial uses that are intended merely to generate profit.

Because the case at issue regarding the Schwarzenegger bobblehead dolls was brought in California, this article focuses on the "transformative use" test, first enunciated by the state Supreme Court in 2001,[3] which is currently employed by California courts in publicity rights cases. Under this test, the bobblehead dolls and packaging at issue are not "transformative," and thus actionable, because they do not represent a "significant transformation" of Schwarzenegger's name and likeness. Rather, the dolls and packaging at issue are primarily, if not entirely, a depiction and imitation of Schwarzenegger, and were created and sold by the doll company in order to profit from an unauthorized use of Schwarzenegger's name and likeness, which have tremendous value in the marketplace.

II. THE PRODUCT AND PACKAGING

Ohio Discount Merchandise, Inc. ("ODM") profits from using the publicity rights of famous people, many of them political figures, by manufacturing and selling "bobblehead" dolls bearing the names and images of famous people.[4] Sales

2. *See* discussion *infra* Parts II–IV.

3. *Comedy III. Prods., Inc.*, 21 P.3d at 808.

4. "Bobbleheads" are collectible figures about seven inches tall with spring-mounted heads that bob up and down. Originally marketed in the mid-20th century, bobbleheads depicting athletes emerged as a significant sports memorabilia craze in the late 1990s and went on to become a full-fledged pop culture phenomenon in the early 2000s. *See* Bill Shaikin, *Statues of Imitation: Bobblehead Dolls Are Back, Igniting First Sports Collectible Craze of New Century*, L.A. TIMES, July 28, 2001, at D5. Manufacturers began selling bobbleheads depicting thousands of different sports players, celebrities, and fictional characters, from the Osbournes to SpongeBob Squarepants and even Jesus Christ. *See* James Sullivan, *No longer just sports souvenirs, bobbleheads are springing off the shelves*, S.F. CHRONICLE, Oct. 29, 2002, at E1, E5.

are made directly from ODM's website, on eBay and other such Internet outlets, and occasionally in retail stores.[5] ODM's dolls carry no political speech; they make no political statement. Rather, they are a means for the company to profit by selling a product with *commercial* value—value derived not from the usefulness of the product, or the creativity of the design, or a "message" on or within the product. The commercial value of the products is derived solely or primarily from the name and image of the famous persons depicted by the products. ODM of course does not own the names and likenesses that give its products commercial value, rather, those property rights are held by the famous persons portrayed in the products, people like Schwarzenegger and others. The rights are theirs alone to protect or license, at their sole discretion.[6]

In 2004, ODM began to manufacture and sell a bobblehead doll of Schwarzenegger, who became famous first as a world-class bodybuilder, then later as a blockbuster motion picture star, and more recently as the governor of California. The dolls were sold in packaging that featured numerous photographs of Schwarzenegger and his name printed in large letters across the box, much like a typical commercial product such as a G.I. Joe doll. The Schwarzenegger dolls were sold in at least one store in California.

The packaging displayed copyright-protected photographs of Schwarzenegger from various periods of his life, including his professional bodybuilding days, his films, and his political career.[7] The packaging also featured a short biography about Schwarzenegger that stated some dates concerning his bodybuilding career, the titles and dates of several of his movies, and some dates from his political career. The biogra-

5. *See* www.bosleybobbers.com (last visited Apr. 14, 2005).

6. ODM admittedly obtains licenses from and pays royalties to non-politicians whose names and likenesses it uses on bobblehead dolls, but does not do so for politicians. *See The Abrams Report* (MSNBC television broadcast, May 18, 2004) (interviewing defendant Todd Bosley).

7. One of the photographs was owned by Schwarzenegger's company and another belonged to the producer of the motion picture *End of Days*. ODM did not obtain licenses to use those copyrights on the packaging. Similarly, ODM did not seek or obtain Schwarzenegger's permission before using his name and photographs on the packaging, and using his name and likeness in the product. *See The Schwarzenegger Bobblehead Case: Introduction and Statement of Facts*, 45 SANTA CLARA L. REV. 547, 549–51 (2005).

phy also contained general personal information about Schwarzenegger, including the date and place of his birth, the date of his marriage, the names of his wife and four children and the date he became a naturalized U.S. citizen. In sum, the packaging portrayed a product about Schwarzenegger *the man,* rather than Schwarzenegger from any one particular time period or career. The packaging also contained no political message.

Inside the box was a doll featuring the likeness of Schwarzenegger, wearing a suit and tie, and holding an assault rifle and bandolier across his chest. The only text on the doll reads: "ARNOLD SCHWARZENEGGER" on the base. Had the doll been sold before 2003, one would likely have concluded that the doll portrayed Schwarzenegger as a character from one of his movies in which his character might have worn a suit and used an assault rifle.[8] In 2004, one is not sure what to make of the Schwarzenegger doll wearing a suit and holding a gun. With no discernable political message on the doll, combined with the packaging focused on Schwarzenegger *the man* and the $19.99 price tag, the notion that the product and its packaging are intended to further a particular political message is quite dubious. If the product and packaging did in fact communicate some political message, just what that message was is anyone's guess.

III. VIOLATION OF COMMON LAW RIGHT OF PUBLICITY

A. History and Purpose of California's Right of Publicity Law

California, like most other states, has long recognized a common law tort for violation of the right of publicity, *i.e.*, the unauthorized "appropriation, for the defendant's advantage, of the plaintiff's name or likeness."[9] The origins of the doctrine date back to an 1890 *Harvard Law Review* article by Samuel D. Warren and Louis Brandeis[10] and a subsequent

8. *See, e.g.*, TRUE LIES (20th Century Fox 1994).

9. Lugosi v. Universal Pictures, 603 P.2d 425, 428 (Cal. 1979) (internal citation omitted); Eastwood v. Superior Court, 198 Cal. Rptr. 342, 346 (1983).

10. *See* Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

New York statute[11] that proscribes unauthorized use of the name, portrait or picture of any living person "for advertising purposes, or for the purposes of trade"[12] and imposes criminal and civil sanctions for its violation.[13] The modern conception of the right of publicity was articulated by Professor Dean Prosser in a 1960 law review article and subsequently recognized by the United States Supreme Court.[14] Simply stated, the right of publicity is "the inherent right of every human being to control the commercial use of his or her identity."[15]

In 1971, the California Legislature supplemented this right when it enacted Civil Code section 3344, which provides in part:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.[16]

In the words of the United States Supreme Court: "The rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[17] The more popular a celebrity becomes, the greater the number of people who recognize him or her, and the greater the visibility

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11. N.Y. CIV. RIGHTS LAW §§ 50, 51 (2005).

12. *Id.* § 50.

13. *Id.* §§ 50, 51.

14. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 571 n.7 (1977) ("One may be liable for 'appropriation' if he 'pirates the plaintiff's identity for some advantage of his own'") (quoting Dean Prosser, *Privacy*, 48 CALIF. L. REV. 383, 403 (1960)).

15. J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2005).

16. CAL. CIV. CODE § 3344(a) (West 2005). This statute complements the preexisting California common law right of publicity; it does not replace or codify the common law. *See id.* at § 3344(g); *see also* Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001); Newcombe v. Adolf Coors Co., 157 F.3d 686, 691–92 (9th Cir. 1998).

17. *Zacchini*, 433 U.S. at 576 (citation, quotations, and brackets omitted).

for products that bear (and/or are advertised using) the celebrity's name or likeness. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit, and right of publicity law protects the celebrity's sole right to exploit this value.

One California Supreme Court Justice explained:

> An unauthorized commercial appropriation of one's identity converts the potential economic value in that identity to another's advantage. The user is enriched, reaping one of the benefits of the celebrity's investment in himself. The loss may well exceed the mere denial of compensation for the use of the individual's identity. The unauthorized use disrupts the individual's effort to control his public image, and may substantially alter that image. The individual may be precluded from future promotions in that as well as other fields. Further, while a judicious involvement in commercial promotions may have been perceived as an important ingredient in one's career, uncontrolled exposure may be dysfunctional. As a result, the development of his initial vocation—his profession—may be arrested. Finally, if one's identity is exploited without permission to promote products similar to those which the individual has already endorsed, . . . [this] will probably diminish the value of the endorsement.[18]

Commercial misappropriation may take many forms including use of one's name, likeness or both on merchandise. Courts have routinely found liability where the unpermitted use takes the form of goods such as "T-shirts, dishes, ashtrays, drinking mugs and the like."[19] "[S]uch commercial products as plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods"—as well as bobblehead dolls—"are not vehicles through which ideas and opinions are regularly disseminated."[20] By contrast, "books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections, not generally accorded 'merchan-

18. *Lugosi*, 603 P.2d at 438 (internal citations omitted).

19. *See* J. THOMAS MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY § 7:21 (2d. ed. 2005).

20. Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 463 (Cal. 1979) (Bird, C.J., concurring) (internal quotations and citation omitted).

dise.'"[21]

Most celebrities invest "considerable money, time and energy" to develop prominence in their particular field.[22] "Similarly, *political figures* have worked hard to build a public image [. . .] To deny protection to a political figure simply because he has chosen to involve himself in politics is unfair."[23]

B. Public Affairs Exception

Under both common law and the statutory right of publicity in California, "no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it."[24]

Here, the Schwarzenegger doll and packaging feature no political slogans, such as "Vote for Schwarzenegger," "Oppose Schwarzenegger," or otherwise. Neither do they communicate any other discernable political message. Nor does the doll or its packaging constitute a news account or other form of "public affairs." Rather, they are merely a depiction or imitation of Schwarzenegger in the form of a doll—a commercial product—and its packaging; both lacking a political message.[25]

Although a narrow, succinctly articulable message is not

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21. Hicks v. Casablanca Records, 464 F. Supp. 426, 430 (S.D.N.Y. 1978).

22. Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797, 803 (Cal. 2001) (internal quotation and citation omitted).

23. Eileen R. Rielly, Note, *The Right of Publicity for Political Figures:* Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, 46 U. PITT. L. REV. 1161, 1182 (1985) (emphasis added).

24. *Downing*, 265 F.3d at 1001 (quoting Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 640 (Ct. App. 1995)). California Civil Code section 3344(d) similarly provides: "For purposes of this section, a use of a name, voice, signature, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required." CAL. CIV. CODE § 3344(d) (West 2005).

25. *The Abrams Report*, *supra* note 6 (UCLA law professor Eugene Volokh told Dan Abrams, when asked about possible First Amendment protections for the Schwarzenegger bobblehead doll: "it's not an obvious case for parody in part because while they show him say with bandolier and a weapon, you know, that's actually pretty close to his actual movie persona . . . so it looks like kind of a straight out depiction, albeit in a bobblehead"); *see also* John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. TIMES, May 18, 2004, at A16 (according to Professor Volokh, "[i]f someone's image is used without much transformation, if it's not a parody or commentary, that is indeed legally actionable, and under that theory Arnold has a very good claim").

a condition of constitutional protection,[26] the absence of such a message here means that ODM cannot hide behind the public affairs exception; the bobblehead is not exempt from liability if it is not a "publication of matters in the public interest."[27] ODM could argue that, by purchasing the product, buyers of the bobblehead were supporting some sort of political "message," such as a purported commentary on Schwarzenegger's gun control policy. Such an argument would be belied, however, by ODM's *own admission* that it depicted Schwarzenegger as carrying a gun "just to show his character. Seems like every time you see him, he has a gun."[28] Moreover, "[a]lmost every commercial use of a political figure's identity contains the potential for 'speech' by the buyer. But a line must be drawn, or everyone involved in the political scene would be fair game for any and all commercially exploitative uses."[29]

The fact that the packaging features a short biography of Schwarzenegger's life does not render the product a "news account" or other "public affairs" communication under the law. In 2001, the Ninth Circuit considered a similar argument and held that an Abercrombie & Fitch clothing catalog that included an article about surfing did not render the unauthorized use of photographs of the plaintiffs-surfers in the catalog protected under the public affairs exception.[30] The court ruled that, although the theme of surfing and surf culture *is* a matter of public interest, "the illustrative use of Appellants' photograph does not contribute significantly to a matter of the public interest and that Abercrombie cannot avail itself of the First Amendment defense."[31]

Similarly, although Schwarzenegger and his life may be a

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26. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995); *see also Comedy III Prods., Inc*, 21 P.3d at 804 ("a work of art is protected by the First Amendment even if it conveys no discernable message").

27. *Downing*, 265 F.3d at 1001 (internal quotations and citation omitted); *Cf.*, Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979) ("That defendants' movie may convey a barely discernible message does not entitle them to appropriate plaintiff's trademark in the process of conveying that message.").

28. Dan Smith, *Bobbleheads will roll, governor's lawyers say*, SACRAMENTO BEE, May 1, 2004, at A1 (quoting company spokesperson Tami Rike).

29. MCCARTHY, *supra* note 15, § 4:26 (emphasis omitted).

30. *See Downing*, 265 F.3d at 1002.

31. *Id.*

matter of public interest, the inclusion of a short biography about him in a commercial product does not automatically render the product and its packaging protected free speech. If that were the case, every commercial product using an unauthorized name, photograph or likeness of a famous person could evade the right of publicity law simply by featuring a short bio about the person depicted. Fortunately for those whose names and images are the constant target of infringement, courts recognize attempts to legitimize commercial misappropriation by tacking onto the product or its packaging a "biography" or other form of "legitimate" speech in an effort to re-characterize the infringement as protected free speech.[32]

> [I]f all it took for a defendant to wrap itself in the First Amendment was to add an appropriate "Express Your Support for _____" slogan on all celebrity merchandise, then the right of a celebrity to control the commercial property value in his or her identity would be destroyed. The First Amendment would be the vehicle for legalizing commercial theft.[33]

C. Political Figures

The notion that political figures have no right to control the commercial use of their names and images contradicts both the letter and purpose of right of publicity laws. If the law did not apply to political figures, companies could freely exploit politicians' names and images in advertising for their products, or on the products themselves, with impunity. George W. Bush toothbrushes and Dick Cheney laundry detergent, for example, could pervade our supermarkets and households.

As one real-life example, after his unsuccessful bid for the Presidency, former U.S. Senator Bob Dole appeared in a string of commercial advertisements for Viagra, Visa, and Pepsi, and presumably was paid a substantial amount of money for each.[34] The law certainly does not support the

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32. *See, e.g.*, Rosemont Enters., Inc. v. Urban Sys., Inc., 340 N.Y.S.2d 144, 146 (N.Y. Sup. Ct. 1973) (board game); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 222 (2d Cir. 1978) ("memorial" poster).

33. MCCARTHY, *supra* note 19, § 7:21 (internal citation omitted).

34. *See* Hilary Cassidy, *How the Mighty Have Risen or Fallen*, BRANDWEEK, Nov. 10, 2003. An advertisement by Pfizer (the maker of Viagra) featuring Sen.

proposition that each of these companies had the right to use Senator Dole's name and image in their advertisements earlier, while he was running for President in 1996—without his permission and without paying him—simply because he was an elected official and presumably exempt from right of publicity laws.[35] No law in America, statutory or case law, supports such a conclusion.

While ODM claims that it obtains appropriate licenses and pays royalties to the non-political celebrities depicted on its other bobblehead dolls, it contends that licenses and royalties are unnecessary for politicians, who are allegedly "part of the public domain."[36] The concept of the public domain is sometimes invoked in connection with copyright law to denote the passage of works out of legal protection and into the realm in which they may be freely exploited.[37] As applied to the right of publicity, the phrase would suggest that the identities of certain individuals receive no protection whatsoever against commercial appropriation.[38] This is so for an individual who lives in a state or country that does not recognize rights of publicity at all,[39] or a deceased person whose public-

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Dole is attached. *See Appendix B*, Photo One, *infra* p. 677.

35. In the days and weeks leading up to the November 2, 2004 Presidential election, fast food chain Carl's Jr. ran a national television commercial featuring the images of President George W. Bush, his challenger Senator John Kerry, former President Bill Clinton, and several other prominent U.S. politicians. The ad contained no political message; the only message was to buy the advertiser's "Double Six Dollar Burger." The images of the politicians were used to attract the attention of television viewers during a hotly-contested political climate, and likely were an infringement of the politicians' publicity rights—their right to control the use of their images for commercial purposes. Whether Bush, Kerry, Clinton and the others choose to enforce their rights against Carl's Jr. is another matter, and if they choose to look the other way, it certainly does not mean their rights do not exist.

36. *See, e.g.*, Christian Berthelsen, *Governor Bent Out of Shape Over Bobbler*, S.F. CHRONICLE, May 1, 2004, at B3 (according to defendant Todd Bosley, "Arnold Schwarzenegger as a governor is considered public domain"); Smith, *supra* note 28 (ODM spokesperson stating "[Arnold Schwarzenegger]'s in the public domain").

37. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 213 (2002).

38. *See* Nicholas J. Jollymore, *Expiration of the Right of Publicity—When Symbolic Names and Images Pass into the Public Domain*, 84 TRADEMARK REP. 125 (1994).

39. *See, e.g.*, Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1031 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 1999) ("Princess Diana's persona is 'in the public domain to the extent that the absence of a right of publicity relinquishes the celebrity persona to the public domain.").

ity rights are not accorded post-mortem protection.[40] But ODM's suggestion that the identities of the thousands of federal, state and local politicians in the United States are not entitled to protection equal to that of every other person in this nation is unprecedented and unsupportable.

> Political figures have usually invested much time, money, and effort in building up a public image, just as entertainers have. Few people are simply thrust into the political arena. By their own labors, in a very competitive field, political figures have created publicity value in their names and faces.
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> Of course, it can be argued that the public gives the political figure publicity value—he would not be a valuable commodity if it were not for the public's recognition. The same argument has, however, been made in the case of entertainers, but courts have protected the celebrity because of the large investment he has made in his career. Political figures likewise have made large investments in their careers and deserve similar protection.[41]

"The decision to enter the political arena should not forever foreclose a person from realizing the financial benefits of fame."[42]

1. Martin Luther King Plastic Busts

Few courts have had an opportunity to rule on an unauthorized commercial use of a political figure's name or likeness.[43] Politicians do not typically pursue such claims, perhaps because they are not so concerned with *commercial* use

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40. *See, e.g.*, Memphis Dev. Foundation v. Factors Etc., Inc., 616 F.2d 956, 957 (6th Cir. 1980) (right of publicity not inheritable under Tennessee law; "[a]fter death the opportunity for gain shifts to the public domain, where it is equally open to all"); *see also* MCCARTHY, *supra* note 19, at § 9:2[C] (At some point after a person's death, "the person's identity should enter the public domain as a part of history and folklore.").

41. Rielly, *supra* note 23, at 1170–71.

42. *Id.* at 1171.

43. *See* Xenia P. Kobylarz, *Governor, Doll Settle*, L.A. DAILY JOURNAL, Aug. 3, 2004, at 1 ("California law is silent when it comes to the publicity rights of public officials"); James D. Nguyen & Michael B. Moore, *Will Court Allow Governor to Terminate Bobblehead Doll?*, L.A. DAILY JOURNAL, July 2, 2004, at 7 ("no published California decision has addressed the specific question of whether elected officials have publicity rights. Case law in other jurisdictions is equally scarce").

of their image (it is not their typical business), or they do not wish to invest the resources into pursuing such claims, or they avoid possible negative publicity for doing so.[44] In *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, which involved facts similar to those at issue here, the Supreme Court of Georgia held that the unauthorized sale of plastic busts of Dr. King was a violation of his post-mortem right of publicity, owned by his estate.[45]

In *King*, the manufacturer had first sought permission from Dr. King's estate to make and sell the plastic busts.[46] Despite the estate's refusal, the company manufactured and sold the products anyway, and reportedly donated a portion of the proceeds to the King Center for Social Change.[47] Dr. King's estate brought suit for infringement of the post-mortem right of publicity, and the Georgia Supreme Court sided with the plaintiff. The court stated that Dr. King was a "public figure," though not a "public official," and thereby limited its decision to "public figures who are neither public officials nor entertainers."[48] The court went on to discuss cases in which various types of persons, including sports figures, movie stars, exotic dancers and private citizens, have been afforded the right of publicity.[49] The Court concluded:

> We know of no reason why a public figure prominent in religion and civil rights should be entitled to less protection than an exotic dancer or a movie actress. Therefore, we hold that the appropriation of another's name and likeness, whether such likeness be a photograph or sculpture, without consent and for the financial gain of the appro-

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44. The federal district in the Rudy Giuliani case (discussed *infra* Part III.C.2) reported that its "review of scores of right to publicity cases from across the country does not reveal any such claims by a high-level public official." N.Y. Magazine v. Metro. Transit Auth., 987 F. Supp. 254, 266 (S.D.N.Y. 1997), *aff'd*, 136 F.3d 123 (1998).

45. *See* Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982).

46. *Id.* at 698.

47. Similarly, in the Schwarzenegger case, ODM claimed it was donating a portion of the bobblehead sales to a cancer charity, though the claim was never verified. Even so, as the *King* court ruled, there is no exception to the right of publicity law for infringers who donate a portion of the profits, rather than retain the profits entirely. *See id.* at 698-99.

48. *Id.* at 700.

49. *Id.* at 700–02.

> priator is a tort in Georgia, whether the person whose name and likeness is used is a private citizen, entertainer, or as here a public figure who is not a public official.[50]

Although the Georgia Supreme Court stopped short of applying the right of publicity to public officials because that issue was not before it, commentators on the *King* holding have opined that extension of the doctrine to public officials is a logical step and consistent with the purpose of the right of publicity doctrine. One commentator writes: "Martin Luther King was undeniably involved in politics, although he never held public office. Therefore, in spite of its attempt to limit its holding, the court, in effect, held that a political figure has a right of publicity."[51] Two other legal scholars, including law professor Lionel S. Sobel, argue that a defendant who appropriates the name and likeness of another person for commercial purposes and economic advantage should not be allowed to take refuge behind the First Amendment's guarantees of speech and press freedom simply because the defendant selects a public official as the individual whose commercial and economic rights are to be usurped: "We are dealing with nothing more than commercial interests and economic gain as the purpose of and motive for the appropriation, and it should make no difference whether the name or likeness appropriated is that of a ballplayer, a Vice President or even a President.[52]

2. Rudy Giuliani Advertisements

In 1998, the Second Circuit Court of Appeals held that the New York Metropolitan Transportation Authority ("MTA") could not stop the publisher of *New York Magazine*

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50. *Id.* at 703.

51. Rielly, *supra* note 23, at 1163.

52. Albert F. Smith & Lionel S. Sobel, *The Mickey Mouse Watch Goes to Washington: Would the Law Stop the Clock?*, 62 TRADEMARK REP. 334, 346 (1972). However, the authors also note that "where the matter involves a public official as prominent and as controversial as the Vice President, there may not be a clear dividing line between commercial products and a 'product' having overtones of symbolic speech, possibly evoking constitutional protection." *Id.* at 347; *but see* Frank Leo Brunetti, Comment, *Invasion of Privacy—Recovery for Nonconsentual Use of Photographs in Motion Pictures Based on the Appropriation of Property*, 11 DUQ. L. REV. 358, 377 (1973) ("Even the President of the United States could sue for appropriation if his photograph was used on a tee-shirt [sic] or poster.").

from running a bus advertising campaign that used the name of Mayor Rudy Giuliani only days after he won the mayoral race.[53] The advertisement featured the magazine's logo and read, "[p]ossibly the only good thing in New York Rudy hasn't taken credit for."[54] The court held that the MTA, as a government agency, could not stop the bus advertisement because doing so would be an unconstitutional prior restraint.[55] However, the court suggested that Guiliani himself might have a potential claim for violation of his right of publicity.[56]

Nevertheless, it could be argued that the content of the advertisement came close to, if not within, the "public affairs" exception because it referenced an issue that was the subject of debate in the very recent mayoral race, namely, whether Mayor Guilaini improperly took credit for certain accomplishments.[57] On the other hand, a dissenting judge on the Second Circuit panel firmly concluded that the *New York Magazine* advertisement "plainly violate[d]" the New York right of publicity statute.[58] The judge rejected any potential defenses based on incidental use, public interest or satire.[59]

3. Franklin D. Roosevelt Cigars

In the 1936 case of *Prest v. Stein*, a company sold "Franklin D. Roosevelt" cigars, utilizing the name and image of then-President Roosevelt.[60] An unfair trade practice claim was brought on behalf of President Roosevelt in Wisconsin but

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53. *See* N.Y. Magazine, 136 F.3d 123.

54. *Id.* at 125.

55. *Id.* at 131–32 ("A prior prohibition of the Advertisement is certainly more extensive than is necessary to serve the governmental interest asserted here, particularly where. . . requiring MTA to display the Advertisement would not result in irreparable harm to MTA.").

56. *See id.* at 132 ("[New York Civil Rights Law] Section 51 already provides remedies for violation of [section] 50, which may be asserted by the person who feels his rights are affected. If [section] 50 does protect Mayor Giuliani from the use of his name in this Advertisement, he may seek redress under [section] 51 . . . .").

57. "While the Advertisement served to promote the sales of a magazine, it just as clearly criticized the most prominent member of the City's government on an issue relevant to his performance of office, subtly calling into question whether the Mayor is actually responsible for the successes of the City for which he claims credit." *Id.* at 131.

58. *Id.* at 132.

59. *See N.Y. Magazine*, 136 F.3d at 132–33 (Cardamone, J., dissenting).

60. *See* Prest v. Stein, 265 N.W. 85 (Wis. 1936).

dismissed because, as of 1936, neither federal law nor Wisconsin state law recognized the right of publicity doctrine.[61]

> Apparently there is no federal statute securing to an individual the right to the exclusive use of his name and photograph. Wisconsin has no such statute. In the absence of such a statute, it was not unlawful for the defendant to use the name and portrait of the President for advertising purposes. The fact that it is in poor taste and shocks our sense of propriety that the name and portrait of the chief magistrate of the nation should be so used does not make it illegal and unlawful.[62]

Legal commentator J. Thomas McCarthy finds the court's decision outdated and incorrect under the modern concept of a right of publicity.[63] He believes that society would recognize the advertisement as "a blatant and exploitative use of the President's identity to draw attention to a commercial advertisement."[64]

D. Transformative Use

1. California Standards

There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment, which becomes particularly acute when the person seeking to enforce the right is a famous actor, athlete, politician, or otherwise famous person.[65]

In California, the applicable test for determining whether an unauthorized use of a person's name, likeness or both in an expressive work is protected by the First Amendment is known as the "transformative use" test.[66] In 2001, the Cali-

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61. *Id.* at 87.
62. *Id.*
63. MCCARTHY, *supra* note 15, at § 4:26.
64. *Id.*
65. ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 931 (6th Cir. 2003).
66. Other jurisdictions currently utilize various standards when balancing publicity rights against the First Amendment. For instance, the Missouri Supreme Court recently adopted a "predominant use test," which states:

> If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances. If, on the other hand, the predominant

fornia Supreme Court held that when an artistic work "adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation," First Amendment protection of the work outweighs whatever interest the state may have in enforcing the right of publicity.[67] Conversely, "[w]hen artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist."[68] Applying this new "transformative use" test, the Court concluded that an artist's rendering of the likenesses of The Three Stooges, and use of that image on lithographs and T-shirts which he sold, was not entitled to First Amendment protection because the Court could discern no significant transformative or creative contribution in the artist's work.[69]

In close cases, the California Supreme Court prescribed the use of another, subsidiary inquiry: "[D]oes the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?"[70] If this question is answered in the negative, then there is generally no actionable violation of the right of publicity. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection,

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purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.

Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (internal citation omitted). The Tenth Circuit has utilized a balancing test that involves "examining the importance of [the defendant's] right to free expression and the consequences of limiting that right" and then weighing "those consequences against the effect of infringing on [the plaintiff's] right of publicity." Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 972 (10th Cir. 1996). Borrowing standards from several other jurisdictions, the Sixth Circuit Court of Appeals also seems to have created a sort of balancing test that weighs the substantiality and effect of the defendant's use against the informational and creative content of that use. *See ETW Corp.*, 332 F.3d at 937–38.

67. *Comedy III Prods., Inc.*, 21 P.3d at 808.

68. *Id.*

69. "His undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame." *Id.* at 409. A copy of the artist's depiction of The Three Stooges is attached. *See Appendix B*, Photo Two, *infra* p. 677.

70. *Id.* at 407.

as it may still be a transformative work.[71]

In *Winter v. DC Comics*,[72] the California Supreme Court reached an opposite result when applying its "transformative use" test to comic books containing villainous half-human, half-worm characters that evoked the first names and distorted likenesses of musicians Johnny and Edgar Winter. The Court concluded that the comic books contained significant creative elements that transformed the characters into something more than mere celebrity likenesses.[73] The comic books did not depict Johnny and Edgar Winter literally; instead, the plaintiffs were merely part of the raw materials used to synthesize the comic books. The court commented that any resemblance of the drawings to the plaintiffs was distorted for purposes of lampoon, parody or caricature. Additionally, the court stated that the characters and their portrayals did not greatly threaten the plaintiffs' rights of publicity because fans of the plaintiffs who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions. Accordingly, the court held that the comic books were entitled to First Amendment protection.[74]

2. Application of the "Tranformative Use" Test

Here, the question is whether the ODM dolls featuring the name and likeness of Schwarzenegger, and the packaging featuring his name and photographs constitute a "literal depiction *or* imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass,"[75] like the artistic renderings of The Three Stooges in *Comedy III*, or rather if they "add[] significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation,"[76] like the half-worm creatures with the distorted likenesses of the Winter brothers, as in the *Winter* case.

Applying the test to the packaging, there is no question

71. *Id.*
72. Winter v. DC Comics, 69 P.3d 473 (Cal. 2003).
73. *See id.* at 479.
74. *See id.*
75. *Comedy III Prods., Inc.*, 21 P.3d at 808 (emphasis added).
76. *Id.* at 799.

that the use of Schwarzenegger's identity is nothing more than the literal reproduction of his name and photographs to promote a commercial product for financial gain. The name and photographs are not distorted or otherwise "transformed" from the literal depiction of Schwarzenegger's name and exact image. Nothing on the packaging shows an image of the doll inside—with a suit and gun—thus the packaging cannot take advantage of any argument that could be made for the doll itself. Because the images and graphics on the packaging, by its very nature, are used to commercially promote the product inside, the unauthorized use of Schwarzenegger's name and photographs on the packaging constitutes a violation of Schwarzenegger's publicity rights.

A First Amendment argument has a slightly better chance regarding the doll itself, but not by much. The use of Schwarzenegger's name and likeness on the doll is little more than an "imitation" of Schwarzenegger. The fact that the doll wears a suit and carries a gun and bandolier does not necessarily "transform" the doll from an imitation of Schwarzenegger into "something else." It is still an imitation. The suit is perhaps meant to reference Schwarzenegger's political career, and the gun and bandolier might have been intended to invoke his motion picture career, perhaps from movies such as *Commando*[77] or *Predator*[78] where his character used such weaponry. The doll could also be an attempt to depict a character from one of Schwarzenegger's movies who wore a suit and carried a gun, such as in *True Lies.*[79] As ODM's own spokesperson acknowledged, Schwarzenegger (in his motion pictures) is frequently seen with a gun, and thus the presence of a gun in the doll's hands was "just to show his character."[80]

Whatever the allusion, the doll remains an imitation of Schwarzenegger. As the packaging seems to suggest, the doll might be an imitation of Schwarzenegger *the man* who moved from a motion picture career into a political career. The use of Schwarznegger's publicity rights on dolls sold for $19.99 on websites and in stores, packaged in boxes, and totally devoid

77. COMMANDO (20th Century Fox 1985).

78. PREDATOR (20th Century Fox 1987).

79. TRUE LIES (20th Century Fox 1994).

80. Smith, *supra* note 28, and accompanying text (quoting ODM spokesperson).

of any "transformative" elements, is very similar to the conventional depiction of The Three Stooges images placed on T-shirts and lithographs and sold to the public, which the California Supreme Court held to be non-transformative and unlawful.[81]

The doll at issue does not approach the "transformative" quality of the distorted likenesses of the Winter brothers who were depicted as villainous half-worm creatures that wreaked havoc and ultimately had to be destroyed.[82] The added creative elements of the worm-like characters are enormous, whereas the added, supposedly creative elements of depicting Schwarzenegger in a suit with a gun and ammunition belt are minimal, particularly given his prior career as an action motion picture star. The Schwarzenegger doll is far more a commercial celebrity imitation, for purposes of profiting off a major world-wide celebrity, than it is a "transformative" use as articulated in the *Winter* case.

Moreover, one of the factors in *Winter* and *Comedy III* was whether the celebrity's right of commercial exploitation of his name or image might be damaged by the unauthorized use.[83] The California Supreme Court reasoned that the Winter brothers were not damaged because their fans were not likely to purchase the comic book in order to see an image of them.[84] By contrast, fans of The Three Stooges might likely purchase one of the T-shirts or lithographs sold by the artist in that case, because the image was much more of a literal depiction of the celebrities and, thus, the products were cutting into the market for any products that might be offered by the celebrities' authorized licensee(s).[85] Here, the Schwarzenegger doll and packaging fall into the latter category. Fans of Schwarzenegger are the likely buyers of dolls with his

81. *See Comedy III Prods., Inc.*, 21 P.3d at 811.

82. *See Winter*, 69 P.3d at 479. A copy of a page from the comic book is attached. See *Appendix B*, Photo Three, *infra* p. 678.

83. *See Comedy III Prods., Inc.*, 21 P.3d at 800; *Winter*, 69 P.3d at 477.

84. *Winter*, 69 P.3d at 479 ("Plaintiffs' fans who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions"); *see also Comedy III Prods., Inc.*, 21 P.3d at 808 ("works of parody or other distortions of the celebrity figure are not, from the celebrity fan's viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect").

85. *See Comedy III Prods., Inc.*, 21 P.3d at 811.

name and image, thus diminishing Schwarzenegger's ability to license his publicity rights for similar commercial products.

E. Parody

California's "transformative use" test does not distinguish between parody and non-parody uses of name or likeness because the *Winter* court found these categories irrelevant.[86] Instead of inquiring into whether the work is parody, satire, caricature, serious social commentary or any other specific form of expression, the court determines whether the work is transformative.[87]

If the parody defense ever existed in commercial California misappropriation cases (as opposed to copyright infringement cases, where the defense is actually recognized),[88] the defense has now been incorporated into and replaced by the "transformative use" test. As explained above, the Schwarzenegger doll and packaging at issue are not "transformative," and therefore are not protected free speech; rather, they are celebrity imitations made for commercial purposes, and thus are actionable.[89]

In addition, even if parody were recognized as a defense to violation of the right of publicity, the packaging and doll at issue here do not qualify. The packaging suggests no elements of a parody; rather, it suggests that it contains a legitimate commercial product inside. Similarly, the doll lacked elements of parody. Instead, as discussed previously, and as the packaging suggests, the doll was a depiction or imitation of Schwarzenegger *the man* in a commercial product sold for $19.99, for the purpose of profiting from one of the most well-known celebrities in the world.[90] The doll lacked any discernable message, political, parody, or otherwise. ODM's spokesperson even admitted that the doll depicted Schwarzenegger holding a gun for identification purposes, and not for parody.[91]

86. *See Winter*, 69 P.3d at 479.
87. *See id.*
88. *See* 17 U.S.C. § 107 (2000).
89. *See* discussion *supra* Part III.D.2.
90. *See id.*
91. Smith, *supra* note 28, and accompanying text (quoting ODM spokesperson).

Moreover, if a company could use a politician's name and likeness without authorization and hide behind a "parody" argument, it would open the doors to wholesale commercial infringement of politicians' publicity rights. For example, Pfizer could use the name and photograph of Senator Bob Dole—without his permission and without paying him—in an erectile dysfunction advertisement for Viagra, and justify it is a "parody." As previously stated, no law in America supports such a result. Similarly, a depiction or imitation of Schwarzenegger on a doll and its packaging, lacking any discernable message, does not constitute a parody, or otherwise justify the commercial exploitation his name and image without authorization or compensation.[92]

F. Fair Use

ODM cannot defend its actions as a "fair use" of Schwarzenegger's name and likeness because California law recognizes no such defense to claims for violation of the right of publicity.[93] While some commentators have recommended importing a fair use defense from copyright law,[94] the California Supreme Court ultimately declined to do so, reasoning that "a wholesale importation of the fair use doctrine into right of publicity law would not be advisable."[95] As Professor McCarthy has noted: "It seems strange to propose to bring

92. In *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), the Ninth Circuit quickly rejected a "parody" defense offered by the defendants in a right of publicity action brought by Vanna White of television game show Wheel of Fortune. White sued when Samsung ran an advertisement depicting a robot dressed in a wig, gown and jewelry posed next to a game board recognizable as the Wheel of Fortune set. The Ninth Circuit stated:

> This case involves a true advertisement run for the purpose of selling Samsung VCRs. The ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: 'buy Samsung VCRs.' . . . The difference between a 'parody' and a 'knock-off' is the difference between fun and profit.

Id. at 1401. Similarly, here, the Schwarzenegger bobblehead doll was created for profit and any "parody" aspects are only tangentially related to the doll's primary purpose of generating a commercial profit for ODM.

93. *Comedy III Prods., Inc.*, 21 P.3d at 807.

94. *Id.* (citing Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 TORT & INS. L.J. 635, 650–57 (1995); Randall T. E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 812–20 (1988)).

95. *Id.*

clarity to Right of Publicity law by importing into it some undefinably modified version of one of the most obscure and unpredictable aspects of copyright law."[96] McCarthy concludes, "the copyright concept of 'fair use' is one of the last places to look to find clarity and predictability. It should be invoked only as a last resort after all other solutions have been tried and found wanting."[97]

IV. COPYRIGHT INFRINGEMENT

ODM unjustifiably infringed the copyrights of the photographs that it printed on the product packaging. As discussed previously, the packaging for the Schwarzenegger doll at issue featured two copyrighted photographs of Schwarzenegger: one photo owned by his company and another owned by the producer of the motion picture *End of Days*.[98] A copyright infringement lawsuit was brought by Schwarzenegger's company, Fitness Publications, Inc., as owner of one photo and assignee of the right to sue for infringement of the other.

A. Ownership and Copying

To establish copyright infringement, two elements must be proven: ownership of a valid copyright and copying of constituent elements of the work that are original.[99] There is no dispute that Schwarzenegger's company was the owner of the two pictures for purposes of the copyright infringement litigation. ODM plainly used the photos, without authorization, when it reproduced them on the bobblehead box.[100] Thus, there cannot be any serious controversy as to the defendant's prima facie liability. The only remaining question, then, is

96. MCCARTHY, *supra* note 19, at § 8:6[D].

97. *Id.* (citing Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 58 (1994) ("automatic invocation of the copyright fair use framework in cases presenting a conflict between the First Amendment and the right of publicity is inappropriate")).

98. *See* discussion *supra* Part I.

99. *See* Feist Pub. v. Rural Tel. Serv., 499 U.S. 340, 361 (1991) (citing Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 548 (1985)).

100. *See* 17 U.S.C. § 106(A) (2000) (copyright owner has exclusive right to reproduce the work); *id.* § 501(a).

whether its conduct could be justified by an affirmative defense such as fair use.

B. Fair Use

Under federal copyright law, the limited doctrine of fair use permits courts "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[101] This doctrine, which is intended to protect uses for "purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research,"[102] has no application to the bobblehead case and would not excuse ODM from its liability for willfully infringing the copyrights in the photographs.

ODM's use of Schwarzenegger's name and likeness was purely commercial in nature; it was product packaging used to dress up an article of commerce.[103] Although the defendant might argue that the brief "biography" of Schwarzenegger on the box is some sort of commentary or news reporting, that is beside the point. The product for sale—the item that consumers desired and that ODM sold for $19.99—was the doll itself, not the text on the box. The defendant merely used the pictures as a vehicle to sell what was inside the package.[104]

Photographs are a type of creative work, which generally receive stronger protection under the fair use analysis than do predominantly informational works.[105] The defendant also

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101. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

102. 17 U.S.C. § 107. The Copyright Act sets forth four non-exclusive factors to be considered in determining whether a fair use was made of a work: "(1) the purpose and character of the use . . . (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . . and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.* "All are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578.

103. *See Harper & Row, Publishers, Inc.*, 471 U.S. at 562 ("every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright") (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

104. *See* Nguyen & Moore, *supra* note 43 ("In the copyright arena, using part of a public official's work for commentary may be lawful, but selling that official's work for commercial gain is generally not. Ohio Discount Merchandise will have a tough time convincing a court that it used Schwarzenegger's photographs for news or commentary.").

105. *See* Stewart v. Abend, 495 U.S. 207, 237 (1990); *see also* Rogers v.

used almost the entirety of the photographs rather than just a small portion of each. "Nor does it appear the company transformed the photographs, making a parody defense difficult."[106] In sum, this purely commercial use of the pictures as product adornment comes nowhere close to the comment, criticism and other similar purposes that fair use protects.

V. CONCLUSION

Opportunistic freeriders should not be permitted to profit at the expense of hard-working individuals, including politicians, who have invested enormous amounts of time and energy into building value in their names and likenesses. While the public is of course free to comment on and criticize our elected officials in print, broadcast, art and elsewhere, merchandisers cannot abuse the Constitution to immunize blatantly commercial, non-transformative exploitation of those same individuals' identities purely for profit. "The first amendment is not a license to trammel on legally recognized rights in intellectual property."[107]

Koons, 751 F. Supp. 474, 480 (S.D.N.Y. 1990).

106. Nguyen & Moore, *supra* note 43.

107. Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979).