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2015

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## Recommended Citation

Shah, Milin Y., "The Need to Adopt a Uniform Right of Publicity Standard" (2015). *Law School Student Scholarship*. 791.  
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## ***The Need to Adopt a Uniform Right of Publicity Standard***

**By: Milin Y. Shah**

### ***I. Introduction***

The estates of the top 13 deceased celebrities earned more than \$360 million over the last 12 months.<sup>1</sup> To no surprise, Michael Jackson's estate ranks number one on this list having earned more than \$140 million this past year.<sup>2</sup> These revenues are received primarily in the form of royalties generated from licensing the trademark, right of publicity, and likeness rights of the deceased celebrities.<sup>3</sup> Apparel, fashion accessories, fragrance, live shows, music albums, collectibles, and even slot machines are all examples of categories of merchandise, products, and services that exploit the popularity and commercial value of both living and deceased celebrities.<sup>4</sup> But, not all celebrities have been able to secure the legal protection required to successfully financially exploit the value of their individual names and likeness because of the existing dichotomy among state laws, state courts, and circuit courts when confronted with right of publicity claims. For example, American icon Marilyn Monroe sits at number six of the top 13 deceased celebrity earnings list having earned \$17 million this past year.<sup>5</sup> But, Monroe's earnings were significantly impacted due to a 2008 legal battle that ultimately decided that the Marilyn Monroe estate had no claim of exclusive control over Marilyn Monroe's right of publicity.<sup>6</sup> In *Shaw Family Archives, LTD. v. CMG Worldwide, Inc.*, the United States Southern District Court for the Southern District of New York held that "New York did not recognize a transferable postmortem right of publicity" when Monroe died in 1962.<sup>7</sup> Meaning, at the time Monroe died New York did not recognize publicity rights, therefore, Monroe could not transfer those rights to her estate at the time of her death. As a result, Monroe's estate has neither

exclusive control nor any claim of ownership over Marilyn Monroe's likeness, persona, or name.<sup>8</sup>

The *Shaw Family Archives* holding significantly impacted the financial earnings potential of Monroe's estate because photographers, such as Sam Shaw who owned thousands of exclusive photographs of Monroe could continue licensing the rights of his Monroe photographs along with permission to use Marilyn Monroe's name and likeness on products, goods, and services without an obligation to pay Monroe's estate.<sup>9</sup> The Shaw Family hired Bradford Licensing to develop a worldwide licensing and merchandising program to exploit the commercial value of the Monroe name and likeness through the use of Shaw's photography.<sup>10</sup> Bradford Licensing successfully negotiated hundreds of deals worldwide allowing companies to sell Monroe inspired and branded apparel, fashion accessories, online slot machines, fragrance, coffee mugs, jewelry, sunglasses, and more.<sup>11</sup> The revenues earned from royalty income derived under these license agreements exceeded hundreds of thousands of dollars per year for the Shaw Family with no financial obligation to compensate Monroe's estate.<sup>12</sup> Analyzing the complicated history of Marilyn Monroe's right of publicity dispute teaches a few important lessons. First, significant financial value exists in the publicity, likeness, and personality rights of living and deceased celebrities. Second, a clear dichotomy exists among how states recognize the right of publicity and how courts analyze publicity disputes. Third, a clear need exists for Congress to develop right of publicity federal legislation and for the Supreme Court of the United States to dictate a clear test and standard of how to analyze right of publicity claims nationally.

More recently this year, Duane Reade published a photograph taken by paparazzi of celebrity Katherine Heigl walking out of a Duane Reade with its grocery bag.<sup>13</sup> Duane Reade

published this photograph on its Facebook and Twitter accounts with promotional slogans implying an endorsement and an association between Heigl and Duane Reade.<sup>14</sup> Heigl filed a right of publicity action against Duane Reade seeking \$6 million in damages. Heigl and Duane Reade settled the lawsuit.<sup>15</sup> But, at the heart of this dispute was balancing Heigl's right to control the exclusive commercial exploitation of her name, likeness, identity, and personality against Duane Reade's right to freedom of expression and fair use under the First Amendment. Duane Reade's quick willingness to settle with Heigl is a telling sign that companies should not without permission associate themselves with a celebrity implying an endorsement for its products or services through any form of advertising.

The majority of states and courts now recognize that celebrities, athletes, and public figures retain the exclusive right to control the commercial exploitation of their name and likeness.<sup>16</sup> Many state legislatures and courts have recognized the investment a person makes in developing his or her public image by developing a right of publicity body of law to protect public figures from those who try to unfairly leverage a celebrity's fame on a product, service, and/or in advertising. These publicity rights have been shaped by common law and state statutes because no federal legislation exists establishing a national right of publicity protection.<sup>17</sup> Parties defending against a right of publicity action always look to the First Amendment's freedom of expression clause for protection and immunity. Courts have struggled to balance a celebrity's right to control his publicity against a person's freedom of expression First Amendment guarantee. Generally, the courts find appropriation unlawful when a party misappropriates a celebrity's name and/or likeness in commercial activity, however, when the activity is non-commercial, such as news reporting, there is typically no violation.<sup>18</sup> However, the fine line between commercial and non-commercial has become very blurry because traditional non-

commercial entities (magazines, newspapers, television news networks) have combined advertising with providing editorial opinions. Therefore, celebrities are now being aligned with advertisers without consent. Moreover, many courts are permitting commercial exploitation of a celebrity without consent so long as the overall work is considered “transformative”.<sup>19</sup>

At issue are the conflicting state laws and standards imposed by a majority of state and federal courts when addressing right of publicity disputes. The majority of state laws and standards developed by the courts does not adequately protect a celebrity’s right to exclusively control his publicity. The current right of publicity laws and standards provide loopholes and far-reaching leeway allowing parties to misappropriate a celebrity’s commercial value without consent.

The Supreme Court must intervene and dictate a clear right of publicity test deciding that a violation occurs when a party misappropriates a celebrity’s name, likeness, identity, or personality when the defendant intends to draw attention or imply endorsement/association for individual financial gain, regardless of whether the work is transformative or if the defendant is a news media company. This new recommended standard should be based on an objective analysis whereby courts must ask whether the alleged misappropriation of a celebrity persona is predominately used to draw attention OR to create an implied association between a celebrity and a good, service or advertising for individual commercial gain. The only proposed exception applicable to this national standard would be in the appropriation of a celebrity’s name and likeness for news reporting, editorial opinions not combined with advertising, and use in an education setting.

## ***II. The History of the Right of Publicity***

The right of publicity is embedded within the right of privacy.<sup>20</sup> In 1903, the New York Legislature adopted the nation's first privacy statute. This decision was derived from strong public opposition to a New York appellate court decision in *Roberson v. Rochester Folding Box Co.*<sup>21</sup> In *Roberson*, the defendant was a flour distributor who printed 25,000 marketing advertisements with the plaintiff's likeness without permission. The plaintiff attempted to enjoin the company from using his likeness, but the court disagreed and decided in the defendant's favor reasoning that a right to individual privacy/publicity did not exist under New York Law at that time.<sup>22</sup> Subsequently, the New York legislature moved quickly and adopted the country's first privacy statute which laid the foundation for New York's current right of publicity legislation.<sup>23</sup> Shortly after New York introduced the nation's first privacy law, Dean Prosser in an influential article, detailed four types of protections fixed in the right of privacy, including: "(i) intrusion upon one's seclusion or solitude, (ii) public disclosure of embarrassing private facts, (iii) publicity which places one in a false light, and (iv) appropriation of one's name or likeness for the defendant's advantage".<sup>24</sup> The right of publicity was born in Prosser's fourth category. The right of publicity now has become its own body of law, separate from the right of privacy because both rights protect different interests – the right of privacy protects the right of a person to be left alone, while the right of publicity protects a person who seeks to commercially exploit his public image and persona.<sup>25</sup>

In *Haelan Laboratories., Inc. v. Topps Chewing Gum*, the Second Circuit first granted an official "right of publicity" entitlement.<sup>26</sup> In *Haelan*, professional baseball players entered into an exclusive contract with a chewing gum company for the right to use player pictures on packaging in an effort to help promote chewing gum sales.<sup>27</sup> The defendant induced the same players to

sign similar contracts for the use on a competing chewing gum. The defendant attempted to argue that its use of players' photographs on its packaging should be permitted because no state law expressly protects nor recognizes a person's exclusive right to control the use of his own image, therefore, the players' initial contract should be held unenforceable.<sup>28</sup> The Court decided against the defendant and reasoned that "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made in gross".<sup>29</sup> For the very first time, a court recognized and protected an individual's right to control his publicity and to seek financial gain through commercial exploitation of his own name and likeness. The court reasoned that individuals such as popular athletes have a commercial value in their individual identities and they must be allowed to enter into exclusive contracts allowing the use of their photographs in advertisements displayed in "newspapers, magazines, buses, trains, and subways".<sup>30</sup> The right of publicity was born and the original intent for the protection was to ensure public figures were afforded exclusive control over the commercial and financial exploitation of their individual personalities.

The Supreme Court of the United States has only addressed right of publicity on one occasion. In *Zacchini*, a television network aired a 15 second performance of the plaintiff without permission and against plaintiff's express disapproval.<sup>31</sup> The defendant television company sought protection under the First Amendment arguing its broadcast of the performance should be observed as freedom of expression and a public interest in reporting the news.<sup>32</sup> The Supreme Court of Ohio agreed with the network reasoning that "the press had a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private".<sup>33</sup> However, the Supreme Court of the United States reversed the state court's decision and drew a line between news reporting that is protected versus news reporting that is

not. In *Zacchini*, the Court held in favor of the plaintiff because the defendant network broadcasted the entire performance of the plaintiff instead of providing a news report on the events.<sup>34</sup> The Court reasoned that if the defendant had provided commentary on the performance and showed parts or highlights of the events then the use of plaintiff's likeness would have been protected under the newsworthy exception of the First Amendment.<sup>35</sup> This decision has led to chaos among the lower courts because the Supreme Court did not elaborate or put forth a uniform standard regarding how to correctly analyze right of publicity claims moving forward. For example, the Court did not elaborate on how much of the performance a network could have broadcast to immunize itself from a right of publicity claim. What exactly crosses the line from non-commercial activity to commercial activity? The Court clearly articulated that the original intent for right of publicity protection was to ensure individuals be provided a right to exclusively control over the commercial exploitation of their individual personalities. But, this narrow Supreme Court holding has led to inconsistency in right of publicity jurisprudence because the Court never provided a clear test or standard for analyzing future right of publicity disputes.

### ***III. Stretching Right of Publicity Protection Beyond Name and Likeness***

Generally, a plaintiff must prove the following four elements to establish a right of publicity violation: (i) defendant used the plaintiff's name and likeness, (ii) appropriation of the plaintiff's name and likeness was to defendant's commercial advantage or otherwise, (iii) the plaintiff did not consent, and (iv) the plaintiff suffered a commercial or other injury as a result.<sup>36</sup>

Courts have stretched right of publicity protections beyond misappropriation of a celebrity name and/or likeness to situations where a party creates an association between a celebrity and a product, good, and/or advertising, even if the name or picture of a celebrity is



omitted from use.<sup>37</sup> Companies who use look-alikes, nicknames, catchphrases, sound-alikes, or former names evoking an association with a celebrity may still be found guilty of violating a celebrity's publicity right.<sup>38</sup>

Due to the lack of federal legislation, right of publicity claims are often accompanied with a federal Lanham Act false designation of origin action. Section 43(a) of the Lanham Act referred to as false designation of origin is often triggered when "any person in connection with any good/service uses in commerce any word, term, name, symbol or any false designation of origin false or misleading representation of fact, which is likely to cause confusion or to deceive affiliation connection or association as to the origin and sponsorship".<sup>39</sup> Simply put, if a party without authorization implies a good, service, advertising, or any other commercial activity is associated with another party's "brand" and/or identity the wronged party may look to the federal court to file a Lanham Act action. However, the Lanham Act is intended to protect trademarks and may only be enforced by the courts in a right of publicity action when a defendant attempts to use a celebrity's name to falsely endorse a product or service.<sup>40</sup>

In *Allen v. National Video, Inc.*, the court failed to recognize Allen's right of publicity claim, but still decided defendant, National Video was guilty for its use of a Woody Allen look alike in an advertising campaign without Allen's permission.<sup>41</sup> The court reasoned that celebrities have a commercial investment in their name and face when endorsing products through marketing and the Lanham Act protects against the misrepresentation of endorsement of goods and services.<sup>42</sup> The *Allen* court should have recognized the plaintiff's right of publicity claim because National Video blatantly impersonated Allen's likeness and implied an endorsement without permission for its own commercial gain. The Ninth Circuit agreed with this opinion in two subsequent decisions – *Midler vs. Ford* and *White vs. Samsung*.

In *Midler*, the defendant, in an advertisement, used a voice similar to the plaintiff during a radio marketing campaign.<sup>43</sup> The court held that when a distinctive voice of a known and popular professional singer is imitated to sell products then a misappropriation occurs and a violation to the singer's right of publicity exists.<sup>44</sup> Further, in *White v. Samsung*, the defendant launched a marketing campaign creating a dressed up robot impersonating plaintiff, Vanna White.<sup>45</sup> Samsung did not appropriate White's name or image directly, but the defendant's advertisement undeniably evoked the thought of White to consumers, implying an association and/or endorsement.<sup>46</sup> The court decided Samsung violated White's right of publicity because implying an association or endorsement is an invasion regardless of whether the use expressly identifies by name or uses an image of a celebrity.<sup>47</sup> In *White*, the court decided that implying an endorsement through any means is more than satisfactory to prove a right of publicity violation. The courts should protect the celebrity's right to exploit its own personal value. Unlike in *Allen*, the court in *Midler* and *White* correctly extended right of publicity protections against companies who may not necessarily directly use a celebrity's name on its products, services, or advertising, but nevertheless, through creative means, manifest an association with a celebrity persona in an attempt for individual commercial gain and profit.

Nicknames appropriated to evoke the thought of a celebrity persona are also not permitted. In *Ali v. Playgirl*, the defendant published in its magazine a picture of a nude black man seated in a boxing ring with distinctive characteristics similar to the plaintiff, Muhammad Ali.<sup>48</sup> The image also included a "World's Greatest" caption.<sup>49</sup> Ali is commonly referred to as "The World's Greatest", therefore, the court in *Ali* concluded the defendant had misappropriated Ali's identity even though it had not used Ali's name or a direct image.<sup>50</sup> Defendant's portrait

educated the thought of Ali and the portrait helped defendant, Playgirl sell more copies of its magazine for commercial gain without Ali's permission resulting in a publicity violation.<sup>51</sup>

Another iconic nickname case involved a famous football player, Eli Hirsch. Hirsch's popular nickname was "Crazylegs", which referred to his unique running style.<sup>52</sup> Hirsch appeared in many commercials where he was always identified as "Crazylegs". The defendant, S.C. Johnson & Son, Inc. began selling a shaving gel for women called Crazylegs.<sup>53</sup> The product did not include a picture of Hirsch nor did it include any reference to football. However, the court in *Hirsch* held in favor of the plaintiff because Hirsch's nickname had significant commercial value and the defendant's use of the same nickname implied an association between defendant's product and plaintiff, which helped the defendant attract attention and increase sales under a false belief that plaintiff endorsed the defendant's shaving gel.<sup>54</sup> The court concluded that the fact defendant used the name Crazylegs instead of Hirsch's actual name did not preclude a right of publicity cause of action because the nickname was synonymous with the plaintiff.<sup>55</sup> Congress and the Supreme Court should dictate a standard similar to the *Hirsch* court mandating that any company who seeks to associate a product, service, or advertisement with a celebrity without permission be held liable even if the appropriation does not include use of a celebrity's real name or actual photograph – if an association is created by any means, then a celebrity's right to control his or her own commercial exploitation is significantly reduced resulting in injury to the celebrity.

In addition to cases involving look-alike, sound-alike, and nickname usage, the appropriation of a catchphrase that is popularly associated with a celebrity is not permitted without a celebrity's express consent. In *Carson v. Here's Johnny Portable Toilets, Inc.* the plaintiff, Johnny Carson was the host and star of The Tonight Show, a well-known television

broadcast. Every night, the television show introduced the plaintiff with the phrase “Here’s Johnny!”<sup>56</sup> In 1967, Carson opened up a chain of restaurants called “Here’s Johnny Restaurants”. The phrase became and continues to be synonymous with the plaintiff. In this case, the defendant sold Here’s Johnny branded portable toilets without the plaintiff’s permission.<sup>57</sup> Carson never registered the Here’s Johnny trademark, therefore, he pursued a right of publicity action. The district court originally dismissed plaintiff’s claim because the defendant had not directly used Carson’s name or likeness. However, the Sixth Circuit, similar to the abovementioned decisions of the Ninth Circuit, reversed this decision reasoning that a celebrity’s identity may be commercially exploited without the direct use of a name or likeness.<sup>58</sup> Even though the defendant did not use Carson’s photo or name, the use of the distinct “Here’s Johnny” catchphrase invaded Carson’s identity and violated his right of publicity because the phrase implied an association for the defendant’s individual financial gain without Carson’s permission.

The above mentioned examples all cite instances where the courts properly protected a celebrity right to exclusive control over the promotion of his or her identity, persona, name, and/or likeness. Celebrities invest a significant amount of time, energy, money, and resources to promote their individual brand names. Companies who without permission seek to associate themselves with a famous person for financial gain should always be found liable. Unfortunately, many parties have successfully misappropriated celebrity identity and created celebrity association for commercial gain without permission due to the lack of uniformity among our courts in how to justly assess right of publicity claims. The current conflicting standards adopted by the courts unfairly provide loopholes for companies seeking to associate products, services, or advertisements with celebrities without permission. This practice is damaging because it unjustly enriches one party while causing significant injury to many celebrities.

#### ***IV. The Right of Publicity Dichotomy***

Accompanying the unclear right of publicity standard dictated by the Supreme Court in *Zacchini* is the lack of consistency among the states' right of publicity legislation. For example, Indiana law expressly protects a celebrity's "personality" from being misappropriated for commercial gain through statute and common law.<sup>59</sup> The definition of "personality" in Indiana includes a person's "name, likeness, signature, voice, photograph, image, gesture, appearance, and even mannerisms".<sup>60</sup> In comparison, New York only protects against unauthorized use of a person's "name, portrait, picture, or voice for advertising purposes or for purposes of trade".<sup>61</sup> Moreover, New York only recognizes right of publicity through statute and does not recognize a publicity common law right, therefore, a celebrity will not be able to file a right of publicity cause of action against a party outside of the New York legislation expressly cited protections.<sup>62</sup> Indiana protects against all types and forms of publicity misappropriation by expressly protecting a celebrity's personality, while New York affords only narrow protections.<sup>63</sup> Another major distinction between New York and Indiana is the recognition of postmortem right of publicity rights. New York does not recognize a transferable right at death of a celebrity's publicity rights, while Indiana does.<sup>64</sup> This distinction is very important because of the significant financial value of a deceased celebrity's personality. As a result, celebrities tend to live in states such as Indiana and California that recognize a postmortem publicity right. Congress should create a federal right of publicity law that allows for publicity rights to transfer to heirs upon death no matter where a celebrity calls home.

Due to Hollywood, the most important state when dealing with celebrity right of publicity is California which enforces both a common law right and statutory right of publicity.<sup>65</sup> The California right of publicity statute strictly holds liable "any person who knowingly uses

another's name, voice, signature, photograph, or likeness in any matter or in products, merchandise, or goods or for purposes of advertising or selling without such person's prior consent".<sup>66</sup> California courts impose a three-step test analysis when confronted with a right of publicity dispute –

“Was there a knowing use of the plaintiff's protected identity, (ii) Was the use for advertising purposes, and (iii) Was there a direct connection between the use and the commercial purpose?”<sup>67</sup>

California's right of publicity has also been shaped by the Ninth Circuit through a number of decisions (mentioned previously) protecting celebrities and holding companies liable who associate themselves in anyway with a celebrity through implied endorsement. Even though California has vastly expanded right of publicity protections for celebrities, the California Supreme Court has created a way for parties to avoid right of publicity prosecution with the application of its transformative use test. The transformative use test derives from one of the factors of the fair use defense doctrine within copyright law.<sup>68</sup> The test examines how the celebrity's likeness is appropriated and asks “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose, or different character, altering the first with new expression, meaning, or message; in other words, to what extent the new work is transformative”.<sup>69</sup> Under this analysis, a work will not infringe upon a celebrity's right of publicity when it adds a substantial amount of new creative elements because the California courts have decided it is less likely to interfere with the economic interests of a celebrity protected by the right of publicity. The Third Circuit, Ninth Circuit, and Sixth Circuit all adhere to the same transformative use analysis when analyzing right of publicity claims.<sup>70</sup>

The transformative use test stands in disapproval with the Supreme Court of Missouri which adheres to a predominant use test in its right of publicity analysis.<sup>71</sup> Under this test, a right of publicity claim is valid so long as the misappropriation of a celebrity personality was used in order to attract attention in an effort to gain commercial advantage.<sup>72</sup> The predominant use analysis does not focus on the purpose, character, or creativity of the misappropriation; rather the test asks whether the use of the celebrity's likeness was intended to increase financial gain and profits by creating an association and/or implied endorsement.<sup>73</sup> The Missouri test asks whether the product, good, or service being sold predominately exploits the commercial value of a celebrity's identity and whether the predominant purpose of the product is to associate with the celebrity.<sup>74</sup> Clearly, there is a need for the United States Supreme Court and Congress to impose a national standard for courts to adhere to when analyzing right of publicity claims because of the existing disparity among our state and circuit courts regarding how to justly assess and decide these disputes.

#### ***V. The Problem with the Transformative Use Test***

The transformative use defense is derived from the California Supreme Court in its effort to balance a celebrity's right to exclusively control his publicity and the right of a party to pursue his freedom of expression rights under the First Amendment. This test asks "whether the celebrity's likeness is one of the raw materials from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."<sup>75</sup> If the product containing the celebrity's likeness is so transformed that it has been primarily the defendant's own expression...rather than the celebrity's likeness, it is protected".<sup>76</sup> The Ninth Circuit evaluates five factors when deciding whether a use is transformative enough to avoid a right of publicity suit; these factors ask:

(i) “if the celebrity likeness is one of the raw materials from which an original work is synthesized, (ii) if [the work] is primarily the defendant’s own expression, so long as the expression is something other than of the celebrity, (iii) the quality of the artistic contribution, (iv) whether the marketability and economic value of the challenged work derives primarily from the fame of the celebrity, (v) when an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, the work is not transformative”.<sup>77</sup>

The transformative use analysis is cumbersome and focuses too heavily on the creativity of the work, rather than the misappropriation of a celebrity’s persona for commercial purpose. The only factor a court should consider in publicity actions is whether the intended use of a celebrity’s likeness is to draw attention or imply an association/endorsement for individual commercial gain. A court’s emphasis should never be placed on the overall transformative use of a celebrity’s likeness; rather it should ask whether the use helps the alleged infringer increase profits and/or attention because the original purpose of the right of publicity protection was to grant celebrities an exclusive right to control the exploitation value of their individual personas.<sup>78</sup>

Recently, a California trial court rejected a plaintiff’s claim that *Call of Duty*, a popular video game had violated his publicity right.<sup>79</sup> The plaintiff, Manuel Noriega was a former military dictator of Panama who was captured and imprisoned by the United States.<sup>80</sup> In 2011, Noriega was released from prison and sent back to Panama. Last year, the defendant, Activision, released a popular video game that clearly included the plaintiff’s likeness, name, and photograph as an avatar in the game.<sup>81</sup> However, the California trial court concluded defendant’s use of plaintiff’s likeness was sufficiently transformative because the use of plaintiff’s likeness was de minimis and the video game as a whole was substantively transformative.<sup>82</sup> This decision and the trial court’s reasoning stood in distinct opposition of California’s appellate court that concluded Activision was guilty of appropriating a popular band, No Doubt’s likeness in a popular video game, *Guitar Hero*.<sup>83</sup> The facts of both cases were identical and the transformative



test was adhered to in both decisions, however, the outcomes were completely different. This example clearly proves the confusing and complex nature of the transformative use test and reinforces the need for the Supreme Court and Congress to intervene and dictate a new national right of publicity standard.

The transformative use standard has paved the way for a number of unjust decisions by state and circuit courts, which have restricted celebrities from exercising exclusive control over the exploitation of their own personalities. In *ETW v. Jireh Publishing*, the defendant created a painting entitled “The Masters of Augusta” that celebrated Tiger Woods.<sup>84</sup> The painting featured Woods in a few poses ranging from swinging his golf club to him crouching on the green of the golf course.<sup>85</sup> The background of the painting included the clubhouse and images of other famous golfers. But, the primary feature of the painting focused on Woods.<sup>86</sup> The portraits were delivered to consumers in a white envelope labeled “Masters of Augusta”, but “Tiger Woods” was also printed on the back of every envelope.<sup>87</sup> Woods filed a lawsuit against the defendant alleging his likeness was misappropriated because Woods never granted the artist permission to use his identity as the focal point of the painting. The defendant sought protection under the First Amendment arguing that he had freedom of self-expression rights and that his use of Woods’s likeness was sufficiently transformative because of the significant creative elements in the painting aside from his usage of Woods.<sup>88</sup> The court agreed with the artist and concluded that enough transformative elements existed in the defendant’s painting to immunize him from liability against Woods’s right of publicity claim.<sup>89</sup> The court spent significant time describing the creativity of the overall painting including the defendant’s inclusion of the clubhouse and other former golfers in an attempt to create a commemorative artwork that only included Woods as part of the whole.<sup>90</sup> The court did not spend enough time or take into account whether the

intended use of Woods's likeness was to draw attention to the painting for a financial and commercial purpose. The defendant would have not sold as many copies as he did if it did not feature Woods. The defendant financially gained and profited due to his appropriation of Woods's likeness. The court acknowledged, but seemed to ignore the commercial value in these paintings because Woods's personal commercial value was already significant – “it is not at all clear that the appearance of Woods's likeness in artwork prints which display one of his major achievements will reduce the commercial value of his likeness”.<sup>91</sup> The court seemed to ignore the original intent of the right of publicity, which has always been to provide a public figure exclusive rights to control his or her commercial exploitation due to the acknowledgment of the significant investment a celebrity makes in developing his or brand overtime. It is baffling that the *Woods* court decided on its own that because Woods's commercial value was strong enough outside of the artwork prints industry that Woods would not suffer financial injury.<sup>92</sup> The foundation to right of publicity legislation is to allow the celebrity the opportunity to solely determine the exploitation of his name, likeness, personality, and identity – the reasoning of the *Wood's* court stretches far beyond this original intent dictated by the United States Supreme Court. When an artist or any entrepreneur without permission decides to create a product, service, or engage in any form of advertising featuring a celebrity in an attempt to financially gain, the celebrity misappropriation should always be considered unlawful.

In a similar example, the Tenth Circuit permitted a trading card company to appropriate the likenesses of major league baseball players without permission to create and sell cartoon versions of baseball trading cards.<sup>93</sup> The court decided that the use of the players' likenesses was permissible by the defendant because the cartoon trading cards included enough sufficiently new creative elements to establish transformative use.<sup>94</sup> Athletes invest a significant amount of time,

money, and resources to become popular public figures and reach celebrity fame. The *Cardtoon*'s court ignored the original intent for the right of publicity protections – granting an exclusive right of control to individual commercial exploitation.<sup>95</sup> Suppose the baseball players in this case wanted to commercially exploit their individual personas by selling cartoon versions of themselves on trading cards? This decision significantly impairs an athlete's right to have exclusive control over his own marketing. A company should never be able to create a product for sale focusing on a celebrity's name, likeness, and personality without permission even if the use transforms the celebrity into a cartoon. Would it be fair for a television network to develop an animated program featuring popular celebrities and athletes in a fictional setting without express permission? No. Similarly, misappropriating and transforming athletes to cartoons on trading cards should never be permissible.

The transformative use test offers too excessive of an opportunity for a party to use names, likenesses, and identities of celebrities without having to compensate and/or seek permission. The use of a celebrity's name and/or likeness should only be permissible when it is not used for commercial gain, but rather for purely news reporting purposes. The best way for courts to determine whether the appropriation of a celebrity name without authorization crosses the line is to ask whether the use was intended to draw attention or imply an association/endorsement for commercial gain. If the *Woods* and *Cardtoons* courts implemented this test, the publicity rights of Tiger Woods and major league baseball players would have been protected.

## ***VI. The Problem With the Newsworthy Exception and Actual Malice Standard***

The First Amendment protects entities that use a celebrity in literary works and in connection with news reporting, often referred to as non-commercial speech.<sup>96</sup> Non-commercial speech is protected by the First Amendment, but the line between commercial and non-

commercial speech is sometimes unclear. As touched upon earlier, in *Zacchini*, the United States Supreme Court held that the television network unprotected by the First Amendment when it aired plaintiff's performance because the broadcast did more than provide editorial opinion. The television network argued First Amendment protection reasoning that the press should have immunity when reporting matters of legitimate public interest especially when a celebrity publicly seeks to perform.<sup>97</sup> However, the Court decided that broadcasting *Zacchini's* entire performance caused injury to the economic value of the plaintiff's performance because the defendant took away *Zacchini's* right of exclusive control.<sup>98</sup> The Court concluded that news agencies' editorial opinions are protected as non-commercial free speech, and, in this case the defendant television network could have been protected if it only provided commentary and reporting on the plaintiff rather than the broadcast of the entire performance. One major concern with this decision is that the Court set no clear standard and test when analyzing right of publicity claims in balance with the First Amendment newsworthy exception. The Court did state entertainment stories featuring celebrities and public figures can be important news that may enjoy First Amendment protection, but the Court never set forth the threshold and standard that would determine whether or not a news agency crosses the line of non-commercial speech to engaging in commercial activity. What if the defendant in *Zacchini* only broadcasted 5 seconds of the plaintiff's performance versus the full 15 seconds? What if only 3 seconds were broadcasted? 10 seconds? Would the defendant's use of plaintiff's likeness have been protected under the First Amendment? The answer is unclear.

Due to this confusion, courts have no clear direction regarding how to balance the First Amendment newsworthy exception with the right of publicity. As a result, the majority of state and circuit courts apply an actual malice test when determining whether a traditional news entity

violates a celebrity's publicity right.<sup>99</sup> Under an actual malice analysis, the plaintiff must prove that the defendant acted with reckless disregard of the plaintiff's persona and created a false impression of association in the mind of consumers.<sup>100</sup> Reckless disregard is a high burden to establish and as a result, many traditional media companies have creatively begun to align celebrities with advertisers to help increase revenues while shielding themselves from liability due to the defendant friendly actual malice test.

For example, in *Hoffman v. Capital Cities*, a magazine company misappropriated an image of celebrity, Dustin Hoffman and altered his photograph to place it on a male model's body dressed up in women's clothing.<sup>101</sup> The clothing on the edited photograph featured advertisements for well-known brands such as Ralph Lauren.<sup>102</sup> Hoffman filed a lawsuit against the defendant magazine company alleging a right of publicity violation. The magazine company argued for protection under the First Amendment's newsworthy exception and the Ninth Circuit agreed reasoning that the defendant did no more than provide editorial opinion.<sup>103</sup> The Ninth Circuit's decision is puzzling because the defendant in this case used a celebrity's name, likeness, and photograph to draw attention and increase profits by aligning the plaintiff's photograph with the defendant's advertisers. Ralph Lauren paid a premium to the defendant magazine company to be associated with Hoffman's photograph, therefore, the magazine company did not provide a news report on Hoffman nor did they provide editorial opinion. The defendant magazine company clearly crossed the line from providing noncommercial to commercial speech unprotected by the First Amendment.

The Ninth Circuit, and courts throughout the country, must adopt the proposed new standard articulated in this note when analyzing all right of publicity claims. Courts should ask whether the misappropriation of a celebrity's persona was intended to draw attention or imply an

association/endorsement for commercial gain. In *Hoffman*, it is clear the magazine company used plaintiff's celebrity image to draw attention for commercial gain through aligning and profiting from advertisers. If the defendant magazine company printed plaintiff's image without affiliating with advertisers for a news report or editorial opinion, then the image should be protected activity within the scope of the First Amendment because no commercial activity would have been directly linked in connection with the use of the plaintiff, however, the defendant here actively misappropriated Hoffman's image to engage in commercial activity and the act should have been held unlawful.

In *Stewart v. Rolling Stone LLC*, the plaintiff, celebrity James Stewart filed a right of publicity action against defendant, Rolling Stone Magazine.<sup>104</sup> Rolling Stone printed an editorial story about the plaintiff, but placed the story in a large fold out page that coincided with a two-page advertisement with Camel cigarettes.<sup>105</sup> The court found the defendant's work as editorial opinion and therefore decided Rolling Stone was protected by the newsworthy exception derived from the First Amendment.<sup>106</sup> The court applied an actual malice test asking whether the plaintiff proved with clear and convincing evidence that Rolling Stone acted with actual malice to purposely align plaintiff with the Camel brand.<sup>107</sup> This is a poor standard and gives magazine companies too much latitude to align any celebrity they want with any advertiser of their choice for financial gain. Clearly, Rolling Stone intended to align the plaintiff with Camel cigarettes by placing its story and image of plaintiff in the same large foldout as the Camel advertisement. First Amendment protection under the newsworthy exception would have been justified if Rolling Stone had published the story on an individual page without an accompanying advertisement. However, the facts above clearly establish an intention by Rolling Stone

Magazine to imply an association between Stewart and Camel. Rolling Stone clearly crossed the non-commercial threshold by using the plaintiff's likeness for commercial gain without consent.

Similarly, in *Namath v. Sports Illustrated* and *Montana v. San Jose Mercury*, two news outlets were permitted to continue misappropriated use of photographs of popular NFL quarterbacks for marketing purposes and merchandise sales without permission from the plaintiffs. In *Namath*, Sports Illustrated used plaintiff's image for marketing purposes in direct mail campaigns to solicit new subscribers.<sup>108</sup> In *Montana*, the defendant used images from prior editorials of plaintiff to sell posters.<sup>109</sup> In both situations, the courts permitted the ongoing celebrity misappropriation and protected both newspapers under the First Amendment's newsworthy exception. These decisions were unfair because the defendants were not providing editorial opinions or news reporting on Namath and Montana – both defendants misappropriated the plaintiffs' names and likeness for commercial gain through advertising and merchandise sales. Similar to the flawed transformative use test, the current actual malice standard courts rely upon when assessing the newsworthy exception in the context of the right of publicity is unreasonable and unjust.

Another manner in which newspapers have escaped liability while profiting from celebrity associations is through conducting surveys and polls. In *New Kids on the Block v. News America Publishing, Inc.* the defendant advertised a new poll calling for consumers to vote on the "sexiest" member of the boy band, New Kids On The Block.<sup>110</sup> To cast a vote, consumers had to dial a 900 number that cost the consumer 95 cents per minute.<sup>111</sup> The defendant earned the revenues and profited from the 95 cents per minute cost paid by consumers.<sup>112</sup> The court protected this use under the newsworthy exception of the First Amendment reasoning that the survey was part of the defendant's news reporting and editorial opinions.<sup>113</sup> A survey and polling

is an essential part of research and news reporting, but the defendant in this case clearly crossed the line from noncommercial to commercial speech by profiting from the poll. The defendant newspaper unjustly exploited the plaintiff's commercial value without consent to increase financial revenues for itself. Under this note's proposed new right of publicity assessment test, New Kids on the Block would have received heightened protection because the court would have found that the defendant newspaper only appropriated the boy band's identity to draw attention for commercial gain, rather than for true news reporting.

The line between commercial and non-commercial speech is not so easily defined. The newsworthy exception should only protect the appropriation of a celebrity or public figure so long as the use is confined within an editorial opinion and/or news reporting. Newspapers, magazines, television networks, etc. should be permitted to use celebrity names when reporting the news, but when celebrity appropriation goes beyond news reporting and use includes commercial purpose and intent, the courts must protect the celebrity's right to control his own publicity. The current actual malice test applied by many courts does not objectively determine whether speech is editorial or commercial. The Supreme Court and Congress must intervene and dictate a new national standard whereby all courts should inquire whether the use of a celebrity's personality without permission draws attention for commercial gain or implies an association/endorsement for financial gain.

#### ***VII. Adopting a National Standard to Evaluate Right of Publicity Claims***

Comic book publishers, television networks, film producers, and magazines should never be permitted to feature a celebrity without authorization if the use of the celebrity's name and likeness is to drive financial profit and commercial gain. But, due to the lack of clarity and the



current disconnect among the judiciary regarding how to evaluate right of publicity actions many celebrity personas are unfairly misappropriated, such as in *Cardtoons* and *Woods*.

However, in a decision that directly clashed with *Cardtoons*, the court in *DOE v. TCI* held a comic book publisher liable for violating a famous athlete's identity when it used the athlete as inspiration for a character in the *Spawn* comic book series.<sup>114</sup> The defendant comic book publisher did not make the character about the athlete, but the character had the same nickname and shared similar unique personality characteristics of the plaintiff. The plaintiff, Anthony Twist, nicknamed as Tony Twist was a professional hockey player recognized as an enforcer type.<sup>115</sup> The defendant was the creator of the popular comic book series, *Spawn*. The series included a character named Twist who embodied an enforcer type personality - the association between the character and the plaintiff was undeniable.<sup>116</sup> The court refused to adopt a transformative use analysis when confronted with the publicity action because the test did not focus enough on the defendant's commercial purpose.<sup>117</sup> The court found in favor of plaintiff's right of publicity claim because the defendant clearly intended to draw attention to his character by associating the character with the plaintiff. The *DOE* court correctly called the transformative test inadequate because it does not focus enough on the commercial purpose and intent of the defendant's actions. The court imposed a "predominately use test" reasoning that "if a product is being sold that predominately exploits the commercial value of an individual's identity, that misappropriation should be held to violate right of publicity and not protected by the First Amendment, even if there is some expressive content in it that might qualify as speech in other circumstances."<sup>118</sup> The predominant use test most closely aligns with this note's proposed framework for how courts should analyze right of publicity claims.

Congress must intervene and endorse federal legislation that provides celebrities with national right of publicity protection. The proposed federal legislation should clearly protect a person's property interest in its personality's (i) Name, (ii) Voice, (iii) Signature, (iv) Photograph, (v) Image, (vi) Likeness, (vii) Distinctive Appearance, (viii) Gestures, (ix) Mannerisms, and/or overall identity. No party should be able to misappropriate the above-defined property interests of a personality's right of publicity for commercial purpose during the personality's lifetime or for 100 years after the date of the personality's death without having obtained previous written consent from the person. Commercial purpose should be defined as seeking financial gain by using an aspect of a person's personality interest in connection with product, merchandise, goods, services, advertising materials, or any other commercial activities. The factors a court should rely upon when analyzing a right of publicity dispute may include (i) Does the defendant's activity include the use of a protected plaintiff's personality interest? (ii) Is the appropriation of the plaintiff's personality commercial advantageous to the defendant? (iii) Did the Plaintiff consent? (iv) Did the defendant's actions cause the plaintiff injury? Ultimately, any court presiding over a right of publicity dispute should hold a defendant liable when the defendant's misappropriation of the plaintiff's personality interest intends to draw attention for financial/commercial gain or imply an endorsement/association for defendant's individual commercial/financial gain without the plaintiff's consent.

### ***VIII. Conclusion***

This note calls for the Supreme Court to articulate a new standard for all courts to adhere to when analyzing right of publicity claims. Celebrities must be entitled to control the marketing and advertising of their own names, images, likenesses, and personalities. Celebrity branding is now a multi-billion dollar industry where celebrities are generating more revenue from product

associations than movies, film, or music. The Jessica Simpson brand is worth over a billion dollars due to its product extensions in apparel, fragrance, footwear, jewelry and more,<sup>119</sup> while the Kim Kardashian Video game is generating hundreds of thousands of dollars every month!<sup>120</sup> Celebrities invest a significant amount of time and energy in elevating their own brands in hopes of generating new revenue streams. The original intent and purpose for the right of publicity protection was to ensure public figures, famous athletes, and celebrities were granted exclusive control over the commercial exploitation of their own personalities. The current methods that courts utilize to assess publicity claims are inconsistent and flawed. Neither the transformative use nor actual malice tests focus enough on the original commercial purpose and intent of a defendant's actions. The lack of protection provided to the plaintiffs in *ETW* and *Cardtoons* must be put to an end. The dichotomy among right of publicity state laws must be put to an end. The split among circuit and state courts in how to analyze right of publicity disputes must be put to an end. The only way to effectively adjudicate a right of publicity claim fairly is to determine whether the usage of the celebrity personality right drives commercial and/or financial growth for the defendant.

The Supreme Court in *Zacchini* held that the original intent for right of publicity protection was to ensure celebrities maintain exclusive rights in controlling their individual commercial exploitation.<sup>121</sup> The Supreme Court and Congress must now clearly articulate a national right of publicity standard to ensure that this original intent is nationally protected. When analyzing publicity disputes, all courts must ask whether the misappropriated celebrity use is either intended to draw attention or imply an association/endorsement for the defendant's financial gain. If the answer is yes, the celebrity misappropriation must always be considered unlawful.

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<sup>1</sup> Dorothy Pomerantz, *Michael Jackson Tops Forbes List of Top-Earning Dead Celebrities With \$140 Million Haul*, Forbes (Oct. 15, 2014), <http://www.forbes.com/sites/dorothypomerantz/2014/10/15/michael-jackson-tops-forbes-list-of-top-earning-dead-celebrities/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> John C. Fuller, *Like a Candle in the Wind: Shaw Family Archives, LTD. V. CMG Worldwide, Inc. and the Flickering Recognition of Marilyn Monroe's Right of Publicity In New York*, 15 Vill. Sports & Ent. L.J. 299 (2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Interview with Milin Shah, Director of Business Development, Earthbound LLC (Nov. 15, 2014).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Eriq Gardner, *Katherine Heigl Ends Lawsuit Over Duane Reade Tweet*, The Hollywood Reporter (Aug. 27, 2014), <http://www.hollywoodreporter.com/thr-esq/katherine-heigl-ends-lawsuit-duane-728552>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>17</sup> Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard*, 4 Buff. L. Rev. 1 (2006).

<sup>18</sup> *Id.*

<sup>19</sup> *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9<sup>th</sup> Cir. 2013).

<sup>20</sup> Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard*, 4 Buff. L. Rev. 1 (2006).

<sup>21</sup> *Id.*

<sup>22</sup> *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (N.Y. App. Div. 1902).

<sup>23</sup> Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard*, 4 Buff. L. Rev. 1 (2006).

<sup>24</sup> *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6<sup>th</sup> Cir. 1982).

<sup>25</sup> *Id.*

<sup>26</sup> Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard*, 4 Buff. L. Rev. 1 (2006).

<sup>27</sup> *Haelan Laboratories, Inc. v. Topps chewing Gum Co.*, 112 F. Supp. 904 (E.D. N.Y. 1953).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine – Adopting A Better Standard*, 4 Buff. L. Rev. 1 (2006).

<sup>38</sup> *Id.*

<sup>39</sup> 15 U.S.C § 1125 (a).

<sup>40</sup> *Allen v. National Video, Inc.* 610 F. Supp. 612 (S.D.N.Y. 1985).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

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- <sup>103</sup> *Id.*
- <sup>104</sup> *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4<sup>th</sup> 664 (Cal. App. 2010).
- <sup>105</sup> *Id.*
- <sup>106</sup> *Id.*
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- <sup>108</sup> *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1<sup>st</sup> Dep’t 1975).
- <sup>109</sup> *Montana vs. San Jose Mercury News, Inc.*, 34 Cal. App. 4<sup>th</sup> 790 (Cal. App. 1995).
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- <sup>111</sup> *Id.*
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- <sup>115</sup> *Id.*
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