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RIGHT OF PUBLICITY: THE RIGHT OF PUBLICITY FAIR USE DOCTRINE - ADOPTING A BETTER STANDARD

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I.
INTRODUCTION

For over two decades, Muhammad Ali dominated the world of boxing.[1] With his unorthodox boxing style of rarely throwing body punches, he would eventually become the only man in history to win the heavyweight championship three times.[2] Throughout his career, Ali was also known for popularizing phrases and witty comments such as "float like a butterfly and sting like a bee," and even went as far as to proclaim himself as "The Greatest."[3] At his retirement in 1981, Ali ended his boxing career with a tremendous record of 56 wins and 5 defeats.[4] Aside from multiple victories in the boxing ring, however, Ali also achieved success in the courtroom.[5]

For example, in *Ali v. Playgirl, Inc.*[6] of 1978, Playgirl, Inc. scheduled to release an issue of Playgirl Magazine, containing a portrait of a nude black man closely resembling Ali.[7] The portrait was an artist's depiction of a man seated on a stool in the corner of the boxing ring with both hands taped and outstretched resting on the ropes and contained the caption, "Mystery Man," accompanied by the verse, "the Greatest."[8] Once Ali became aware of the February Playgirl issue and its contents in January of 1978, he viewed the portrait as offensive and brought suit in the Southern District Court of New York to enjoin Playgirl, Inc. from distributing the article.[9] More specifically, Ali claimed that his statutory right of privacy and his common law right of publicity had been violated.[10] The district court agreed with Ali and granted the preliminary injunction.[11] With regards to the boxer's right of publicity, the court reasoned that in order to

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1 Ali had won the Olympic gold medal in 1960 in the light heavyweight division and would eventually retire in 1981 after losing to Trevor Berbick. Mike Morrison, *Muhammad Ali Timeline*, *at* http://www.infoplease.com/spot/malitimeline1.html.

2 Gregory A. Howard, *Muhammad Ali – Biographical Sketch*, *at* http://www.ali.com/article.cfm?id=26,

3 Johannes Ehrmann, *Muhammad Ali Fanpage*, *at* http://www.float-like-a-butterfly.de/indexe.html.

4 Howard, *supra* note 2.

5 *See* Clay v. United States, 403 U.S. 698, 704 (1971) (finding that the government acted improperly by prosecuting Ali for dodging the draft during the Vietnam War). *See also* Ali v. Playgirl, Inc., 447 F. Supp. 723, 731-32 (S.D.N.Y. 1978) (issuing a preliminary injunction to enjoin the distribution of a magazine containing a portrait of Ali).

6 447 F. Supp. 723 (S.D.N.Y. 1978).

7 *Ali*, 447 F. Supp. at 724. "The cheekbones, broad nose and wide set brown eyes, together with the distinctive smile and close cropped black hair are recognizable as the features of [Ali], one of the most widely known athletes of our time." *Id.* at 726.

8 *Id.* at 726-27.

9 *Id.* at 726.

10 *Id.* at 726.

11 *Ali*, 447 F. Supp. at 731-32.

prevent "unjust enrichment by theft of [Ali's established] good will" and inflicting any damage upon his marketable reputation, the Playgirl issue containing the nude portrait must be removed from circulation.[12]

Recognized by a majority of states by common law or statute, the right of publicity is an intellectual property right giving rise to liability when "one . . . appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade."[13] Generally, in a typical publicity right violation claim, a plaintiff must prove four elements: the defendant's use of the plaintiff's identity, the use of the plaintiff's name or likeness was for the defendant's own commercial benefit, the use was without consent, and the use caused the plaintiff injury.[14] In dealing with cases involving the right, plaintiffs have often attained federal jurisdiction by also bringing claims of false endorsement and unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).[15] Additionally, courts have differed greatly from jurisdiction to jurisdiction with regards to the scope and degree of protection that the right provides.[16] For example, some courts have ruled that only "celebrities" have a right of publicity, while others have ruled that the right is available to all persons;[17] some courts have also viewed that the

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12 *Id.* 728-29 (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 567 (1966)).

13 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2004). *See also* 4 THOMAS J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (4th ed. 2004) [hereinafter McCarthy I] (defining right of publicity as the "inherent right of every human being to control the commercial use of his or her identity. This legal right is infringed by unpermitted use which will likely damage the commercial value of this inherent right of human identity.").

14 Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1447 (11th Cir. 1998). *See also* Vincent M. de Grandpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 80 (2001).

15 Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK REP. 1202, 1206 (2004). Section 43(a) of the Lanham Act provides that:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof . . . which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in civil action by any person who believes that he or she is or is likely to be damaged by such act.

Lanham Act, 15 U.S.C. § 1125(a) (2004).

16 Melissa B. Jacoby & Diane L. Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1336-37 (2002).

17 *Compare Ali*, 447 F. Supp. at 729 (requiring that the plaintiff achieve some degree of celebrated status), *with* Cohen v. Herbal Concepts, Inc., 473 N.Y.S.2d 426, 431 (N.Y. App. Div. 1984) ("The legislative protection is clear, extending to 'any person' within the general public, not merely to those with a publicly identifiable feature.").

right of publicity is preempted by federal copyright laws, while others have not.[18]

However, perhaps the most important and controversial difference in the rulings of courts regarding the right of publicity is the varying considerations given to the freedom of speech and of the press guaranteed by the First Amendment of the Constitution,[19] more specifically an artist's or author's artistic expression.[20] Additionally, since the right of publicity is a state granted right, tensions also exist regarding the Fourteenth Amendment, which states that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[21] The Restatement (Third) of Unfair Competition states that the right of publicity does not provide protection for "the use of a person's identity in news reporting, commentary, entertainment, works of fiction or in *advertising* that is incidental to [commercial] uses."[22] By not considering any freedom of expression guaranteed by the First Amendment, the district court in *Ali* seems to have given too much deference in protecting a person's right of publicity. Similar decisions relating to the right has caused a growing tension between the right and the First Amendment freedom of expression and the use of one's identity for commercial purposes, leaving courts to adopt and apply different and inadequate standards or refusal to address the issue at all.[23] Consequently, a workable standard or exception must be adopted in order to respect First Amendment rights and provide a more uniform body of law within intellectual property.

This Note addresses the right of publicity of not just famous athletes, but any person and its possible coexistence with the established right of artistic expression guaranteed by the First Amendment. Part II of this paper provides a history and background of the right of publicity by examining the origin of the right of privacy and the resulting development of the right of publicity. Part III addresses some standards and tests that courts have

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18 *Compare* Brown v. Ames, 201 F.3d 654, 657-58 (5th Cir. 2000) (ruling that the right of publicity misappropriation was not preempted by the Copyright Act), *with* Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 674 (7th Cir. 1986) (holding that baseball players' rights of publicity were preempted under federal copyright law).

19 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

20 Jacy T. Jasmer, *ETW Corp. v. Jireh Publishing, Inc.: A Workable Standard, An Unworkable Decision*, 5 MINN. INTELL. PROP. REV. 293, 299-306 (2004).

21 U.S. CONST. amend. XIV.

22 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (2004) (emphasis added).

23 *See generally* ETW Corp. v. Jireh Publ'g., Inc., 332 F.3d 915, 924-36, *and Zacchini*, 433 U.S. at 568-69.

applied in an attempt to balance the tension between the publicity right and First Amendment rights. Finally, Part IV suggests that a modified "fair use" exception similar to the fair use defense of copyright law be adopted and applied to right of publicity cases, which would provide some protection for celebrities regarding the appropriation of their names and likenesses and at the same time, allow creations of some qualified artistic works.

II.
RIGHT OF PUBLICITY – HISTORY AND BACKGROUND

The right of publicity is a right derived from the right of privacy.[24] Historically, the right of privacy was considered to be a "personal, nonassignable, nondescendible right, and early cases refused to extend the right to a person's heirs."[25] Individuals in the public spotlight often felt that this privacy right was inadequate to protect their private affairs and longed for a broader form of protection, resulting in the development of the right of publicity.[26] In order to fully understand the right of publicity and its tension with First Amendment rights, this section outlines the development of the right of privacy and publicity by examining several landmark cases and articles, including the important publicity right Supreme Court case, *Zacchini v. Scripps Howard Broadcasting Co.*[27]

A. The Development of the Right of Privacy

The origin of the right of publicity can be traced back to several key influential articles and landmark court decisions, closely relating to the development of the right of privacy.[28] In 1890, a Harvard law review article, entitled *The Right of Privacy*, was published by Samuel Warren and Louis Brandeis detailing the need for a common law "right of privacy" to be adopted by the courts.[29] The article stated that advances in news dissemination mediums and methods at that time, such as "instantaneous photographs and the increased circulation of newspaper publications," were capable of unjustly threatening the privacy of individuals by the public disclosure of personal information.[30] Reasoning that these public

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24 GREGORY J. BATTERSBY AND CHARLES W. GRIMES, *THE LAW OF MERCHANDISE AND CHARACTER LICENSING* § 12:44 (2004).

25 *Id.*

26 *Id.*

27 433 U.S. 562 (1977).

28 THOMAS J. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:4 (2005) [hereinafter MCCARTHY II].

29 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See also* MCCARTHY II, *supra* note 28, at § 1:10.

30 Tina J. Ham, *The Right of Publicity: Finding a Balance in the Fair Use Doctrine –*

disclosures by the press were, at many times, overly intrusive and embarrassing,[31] the authors stressed that a "right to be let alone" was essential in order to maintain an individual's human dignity and punish those who had an absolute disregard for a person's inherent right to enjoy life.[32] In sum, Warren and Brandeis urged courts to provide a cause of action in similar circumstances dealing with the press by "adopt[ing] a common law right of privacy to protect individuals from unwanted *publicity*."[33] Over a decade later after the seminal law review article, the privacy issue was confronted and decided upon by a New York appellate court in *Roberson v. Rochester Folding Box Co.*[34]

In *Roberson*, the defendant flour manufacturer and seller circulated 25,000 lithographic prints and photographic advertisements containing the likeness of the plaintiff.[35] The plaintiff alleged that the defendant unjustly used her good name and picture and caused her great humiliation, complaining a 'right of privacy' had been invaded.[36] Furthermore, the plaintiff sought an injunction, enjoining the flour company from using in any manner her likeness, and $15,000 for emotional distress.[37] The court, in denying the injunction, reasoned that since a 'right of privacy' did not exist under New York law at that time, adopting such a right would upset the settled principles of law guiding the public regarding privacy issues and rights.[38] In response to the general public disagreement to the lack of statutory relief detailed in *Roberson*, the New York Legislature enacted the nation's first privacy statute in 1903.[39] Currently, New York Civil Rights Law provides a cause of action for "any person whose name, portrait, picture or voice is used . . . for advertising purposes or for the purposes of trade without . . . written consent."[40] Two years later, the Georgia Supreme Court, in *Pavesich v. New England Life Ins. Co.*,[41] also adopted a common law right of privacy when a defendant insurance company used the plaintiff's name and picture for advertising services without the plaintiff's

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Hoffman v. Capital Cities/ABC, Inc., 36 U.C. DAVIS. L. REV. 543, 547 (2003).

31 McCarthy II, *supra* note 28, at § 1:10.

32 Warren & Brandeis, *supra* note 29, at 195.

33 Ham, *supra* note 30, at 547 (emphasis added).

34 64 N.E. 442 (N.Y. 1902).

35 Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902).

36 *Id.* at 442-43.

37 *Id.* at 442.

38 *Id.* at 447. *See also* Seth A. Diamond, *So Many Entertainers, so Little Protection: New York, the Right of Publicity, and the Need for Reciprocity*, 47 N.Y.L. SCH. L. REV. 447, 450-51 (2003).

39 Scott J. Shagin, *Celebrity Rights in New Jersey*, 231 N.J. LAW. 15, 16 (2004) (discussing the enactment of sections 50 and 51 of the New York Civil Rights Law).

40 N.Y. Civ. Rights Law § 51 (McKinney2006).

41 50 S.E. 68 (Ga. 1905).

consent.[42] As a result of the enactment of the New York statute and the *Pavesich* dispute, courts generally began to accept the invasion of an individual's privacy as an actionable tort, "creating a somewhat disorganized and inconsistent body of law."[43]

B. The Birth and Development of the Right of Publicity

As the body of privacy law continued to develop, courts eventually recognized a similar but independent publicity right stemming from the right of privacy,[44] as illustrated by the United States Court of Appeals for the Second Circuit in *Haelan Laboratories., Inc. v. Topps Chewing Gum, Inc.*[45] In *Haelan*, baseball players entered into contracts with the plaintiff chewing gum company for the exclusive right to use the players' photographs in connection with the sales of chewing gum.[46] The defendant competitor company, aware of the existing plaintiff contracts, induced the baseball players to enter into separate contracts for authorization to also use the players' photographs for similar purposes. [47] The defendant alleged that people have no legal interest in the publication of their picture besides the right of privacy, which is a personal right and cannot be assignable.[48] In concluding that the first contracts were valid and pertained to a legally exclusive right, the court stated that in addition to the right of privacy, "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,' i.e., without an accompanying transfer of a business or of anything else."[49] Being the first to coin the phrase, "right of publicity,"[50] the appellate court reasoned that aside from emotional distress caused by the commercial use of an individual's name or identity, "prominent persons . . . would feel sorely deprived if they no longer

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42 *Pavesich*, at 81 ("[T]he publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of [the] right [of privacy].").

43 MCCARTHY II, *supra* note 28, at § 1:4.

44 *See* Ali v. Playgirl Inc., 447 F. Supp. 723, 728 (1978) (stating that courts do not distinguish the right of privacy and the right of publicity). However, the court also went on to state that "[t]he distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona.'" *Id.* (citing Zacchini v. Scripps-Howard Broad Co., 433 U.S. 562, 573 (1977)).

45 202 F.2d 866 (2d Cir. 1953).

46 *Haelan Labs., Inc.*, 202 F.2d at 867.

47 *Id.*

48 *Id.* at 868.

49 *Id.*

50 John McMillen & Rebecca Atkinson, *Artists and Athletes: Balancing the First Amendment and the Right of Publicity in Sport Celebrity Portraits*, 14 J. LEGAL ASPECTS SPORT 117, 121 (2004).

received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains, and subways" and that "[the] right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant."[51]

Upon the publication of *Haelan* decision, Professor Melville Nimmer responded, writing an important article in 1954, entitled *The Right of Publicity*, that provided an in-depth analysis of the case and arguments supporting a uniform recognition of the right of publicity.[52] Widely regarded as building the legal foundation for the right of publicity,[53] the article further distinguished the right of publicity from the right of privacy by stating that traditional privacy laws at that time would not adequately protect the commercial value of an individual's identity.[54] Absent the necessary ridicule or humiliation for a claim of privacy intrusion, Nimmer hypothesized that "a commercial market [could] operate efficiently, similar to the law of the traditional intellectual property rights of patents and copyrights" only if an enforceable right of publicity was established "in the hands of the exclusive licensee."[55] Nimmer argued for an assignable right of publicity similar to property rights and placed emphasis on the monetary value of an individual's public persona, stating that "in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money."[56] Finally, considering the right of publicity as a form of intellectual property and comparing it to other similar forms of protection, Nimmer stressed that the commercial use of a person's identity would not necessarily implicate endorsement or approval of a product or service, which is required along with consumer confusion, to be actionable under trademark law and unfair competition.[57]

While courts continued to debate over the definition and scope of the right of privacy and publicity, it was not until 1960 when William Prosser published a California law review article, categorizing privacy invasion into four distinct torts that would uniformly be accepted by the courts.[58] Prosser

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51 *Haelan*, 202 F.2d at 868.

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

53 McCarthy II, *supra* note 28, at § 1:27.

54 *Id.* (citing Nimmer, *supra* note 52, at 204).

55 *Id.*

56 Jason K. Levine, *Can the Right of Publicity Afford Free Speech? A New Right of Publicity Test for First Amendment Cases*, 27 HASTINGS COMM. & ENT. L.J. 171, 179 (2004) (quoting Nimmer, *supra* note 52, at 216). Nimmer also argued that while the publicity right of a well-known person would have a larger value, the right of publicity should be available to everyone, not just celebrities. Nimmer, *supra* note 52, at 217.

57 Nimmer, *Supra* note 52, at 217.

58 McCarthy II, *supra* note 28, at § 1:4 (referring to Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960)).

argued that the right of privacy, or the right "to be let alone," encompassed several possible torts.[59] The four privacy torts articulated by Prosser are: "'intrusion' upon plaintiff's seclusion or solitude; public disclosure of 'private facts' about the plaintiff's personal life; publicity that places the plaintiff in a 'false light' in the public eye; and 'appropriation' of plaintiff's name or likeness for commercial purposes."[60] Although some advocates for the right of publicity claim Prosser's article did nothing but add to the obscurity and hindered the development of the body of law by setting ridged guidelines and not elaborating specifically on the publicity right, the appropriation of an individual's name or likeness for commercial purposes eventually was recognized as the right of publicity and was ultimately adopted by American Law Institute in the Restatement (Second) of Torts.[61]

C. Zacchini and Introduction of the First Amendment Defense

Zacchini v. Scripps-Howard Broadcasting Co.,[62] the first and only Supreme Court case to address the right of publicity, is known for providing justifications furthering the publicity right and considering the applicability of the First Amendment.[63] In *Zacchini*, a "human cannonball" performer brought an Ohio right of publicity claim against a television broadcasting station for airing his entire 15 second performance without authorization.[64] Against Zacchini's wishes, a reporter had videotaped the act and had shown the clip on a news program, together with favorable commentary.[65] The defendant news broadcasting company claimed that the report was privileged by the First and Fourteenth Amendments.[66] The Supreme Court of Ohio agreed with the defendant, reasoning that although "one may not use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial,"[67] "the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private."[68]

The Supreme Court of the United States, upon review of the

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59 *Id.* at § 1:19.

60 *Zacchini*, 433 U.S. at 572, n.7 (citing Prosser, *supra* note 58, at 403.).

61 *See* McCarthy II, *supra* note 28, at § 1:19. *See also* Shagin, *supra* note 39, at 16 ("This [appropriation] tort, the historical antecedent of the right of publicity, has been memorialized in the Restatement Second of Torts. . .").

62 433 U.S. 563 (1977).

63 *See* Levine, *supra* note 56, at 181 ("[T]he Court relied on a mix of justifications, citing both moral and economic rationales for the right.").

64 *Zacchini*, 433 U.S. at 563-64.

65 *Id.* at 564.

66 *Id.* at 565.

67 *Id.*

68 *Id.* at 461.

misappropriation dispute, enunciated three basic functions that the right of publicity serves, analogous to patent and copyright law in order to ultimately "advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"[69] The publicity right prevents unjust enrichment by the theft of the plaintiff's established good will, protects the entertainer's ability to earn a living, and "provides an economic incentive for him to make the investment required to produce a performance of interest to the public."[70] With regards to the Constitutional arguments, the Court stated that entertainment, as well as, news was entitled to First Amendment protection.[71] However, "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent," and had the broadcast company not aired the entire performance, the outcome might be different.[72] In effect, *Zacchini* establishes the recognition of the validity of "at least a limited state publicity right" by the Supreme Court, but the nature of the facts of this case and the Court's minimal analysis of the First Amendment privilege provides little "guidance for the more common right of publicity case, typically involving use of a likeness in advertising or on merchandise."[73] Some courts agree with *Zacchini*, while others regard the case as a copyright fair use analysis and distinguish the holding based on its facts.[74] Ultimately, because of the Supreme Court's narrow holding, courts applying the right of publicity and interpreting the scope of First Amendment rights have greatly differed in results.[75]

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69 *Zacchini*, 433 U.S. at 576 (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

70 *Zacchini*, 433 U.S. at 576.

71 *Id.* at 574-75, 578.

72 *Id.*

73 *See Jireh Publ'g.*, 332 F.3d 915, 918 (using Tiger Wood's image on a sold painting); Cardtoons v. Major League Baseball Players Ass'n, 95 F.3d 959, 962 (producing caricature trading cards of famous baseball players); and Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 130 (Wis. 1979) (advertising a woman's shaving cream using the name "Crazylegs," which had been previously adopted by the plaintiff as a nickname). *See also* Jeremy T. Marr, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C.L. REV. 863, 869 (2003).

74 Jay F. Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 21 (2003).

75 Levine, *supra* note 56, at 183.

III.
TESTS APPLIED TO RECONCILE THE RIGHT OF PUBLICITY WITH THE FIRST AMENDMENT

The typical right of publicity case involves the use of an individual's name or likeness for commercial purposes, such as advertising or on merchandise.[76] Defendants in these right of publicity cases contend that the use of the individual's identity is a form of expression and speech.[77] Even though the defendant's use is for commercial purposes, the use becomes a form of entertainment to the public, which has been uniformly established to be protected under the First Amendment.[78] Courts have continually struggled in determining exactly what elements or characteristics are needed to qualify as a protected freedom of expression and with no guidance from state statutes or previous case law, courts deciding freely and differently on right of publicity claims, involving advertising or merchandise, only added to the tension between the right and the First Amendment.[79] To address this issue, different tests and standards were applied by courts in an attempt to strike a balance between the right of publicity and the First Amendment freedom of expression right.[80] This section addresses four popular and modern standards applied by the courts: the "actual malice" test, "transformative" test, "artistic relevance" test, and "predominant purpose" test.

A. The "Actual Malice" Test

The leading case for the "actual malice" test is *Hoffman v. Capital Cities/ABC, Inc.*[81] In *Hoffman*, Actor Dustin Hoffman brought suit for publicity right violations against a magazine company when an issue of the

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76 *See supra* note 73 and accompanying text.

77 *See infra* note 84 and accompanying text.

78 *See Cardtoons*, 95 F.3d at 969 (quoting Winters v. New York, 333 U.S. 507, 510 (1948)) ("Speech that entertains, like speech that informs, is protected by the First Amendment because '[t]he line between informing and the entertaining is too elusive for the protection of that basic right."). *But see* Comedy III Prods. V. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001) (Courts "that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amenment.")

79 *See supra* note 74 and accompanying text.

80 *See Comedy III*, 21 P.3d at 798 (requiring that the resulting work "adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."); *Jireh Publ'g*, 332 F.3d at 937 (adopting an "artistic relevance" test to determine whether the sold paintings of a famous golfer was Constitutionally protected); and Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (employing a "predominant purpose" test to hold that the use of a hockey player's name for a comic book character was a violation of the athlete's right of publicity).

81 255 F.3d 1180 (9th Cir. 2001).

magazine displayed a computer altered picture of him with the body of a male model, wearing a dress and high-heeled sandals.[82] The picture was an alteration of an advertisement for a movie that Hoffman had recently starred in.[83] Even though the magazine created the photo for the purposes of selling the issue, the appellate court viewed the photograph as having some expressive elements because it did not advance a commercial message and it was "a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors."[84] In this sense, "[a]ny commercial aspects are 'inextricably entwined" with expressive elements, and so they cannot be separated out 'from the fully protected whole,'" and thus are still capable of First Amendment protection.[85] The court then applied an "actual malice" test in which the "[plaintiff] must demonstrate by clear and convincing evidence that [the defendant] intended to create the false impression in the minds of its readers that when they saw the [work] they were seeing the [original image]."[86] The defendant unknowingly misleading the readers does not amount to actual malice.[87] The court held that Hoffman did not meet this burden and the magazine photograph was entitled to First Amendment protection.[88]

B. The "Transformative" Test

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,[89] the plaintiff, Comedy III Productions, was the registered owner of all rights to "The Three Stooges."[90] Without consent, Defendant Gary Saderup, an artist, had produced a charcoal drawing of the trio's likeness and sold lithographs and T-shirts containing the drawing.[91] The plaintiff alleged that the publicity rights of "The Three Stooges" had been violated and sought a permanent injunction.[92] Saderup claimed that enforcement of an injunction regarding the charcoal drawing would violate his right of free speech and expression under the First Amendment.[93] The Supreme Court of California

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82 Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1183 (9th Cir. 2001).

83 *Id.*

84 *Id.* at 1185.

85 *Id.* at 1185-86 (citing Gaudiya Vasihnava Soc'y v. City & County of San Francisco, 952 F.2d 1059, 1064 (9th Cir. 1990).

86 *Id.* at 1187.

87 *Hoffman*, 255 F.3d at 1187.

88 *Id.* at 1189.

89 21 P.3d 797 (Cal. 2001).

90 *Comedy III*, 21 P.3d at 800.

91 *Id.*

92 *Id.* at 801.

93 *Id.* at 802. Saderup also unsuccessfully claimed that the California right of publicity statute "applies only to uses of a deceased personality's name, voice, photograph, etc., for the purpose of advertising, selling, or soliciting the purchase of, products or services." *Id.* at

established a balancing test between the First Amendment and the right of publicity based on "whether the work in question adds significant creative elements so as to be *transformed* into something more than a mere celebrity likeness or limitation" and held the Saderup's charcoal drawing was not transformative enough to be entitled to First Amendment protection because the drawing was a literal depiction of "The Three Stooges."[94]

Applying principles derived from the first element of copyright law's fair use doctrine and considering the goal of encouraging free expression and creativity, the court examined the "purpose and character of the use" to determine whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[95] The court summarized this "transformative test" by stating:

> [T]he inquiry is whether the celebrity 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. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word "expression," we mean expression of something other than the likeness of the celebrity.[96]

The court further added that transformative uses of a person's identity for commercial purposes can take place in many protected forms, such as parody, news reporting, fictionalized portrayal and social criticism.[97]

C. The "Artistic Relevance" Test

Aside from the "transformative" test used in *Comedy III*, some courts have alternatively adopted an "artistic relevance" test to determine whether a use of an individual's identity is protected against a right of publicity claim.[98] For example, in the Second Circuit case, *Rogers v.*

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94 *Comedy III*, 21 P.3d at 798 (emphasis added).

95 *Id.* at 808 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)). "[B]oth the First Amendment and copyright law have a common goal of encouragement of free expression and creativity, the former by protecting such expression from government interference, the latter by protecting the creative fruits of intellectual and artistic labor. . . . The right of publicity . . . shares this goal with copyright law." *Id.* at 808.

96 *Id.* at 809.

97 *Id.*

98 Christopher P. Beall, *The Right of Publicity: Status Under Colorado Law*, 33 COLO. LAW. 27, 30 (2004) (citing Seale v. Gramercy Pictures, 949 F. Supp. 331, 337-38 (E.D. Pa.

Grimaldi,[99] a defendant movie producer titled a fictional film, "Ginger and Fred" after the famous Ginger Rogers and Fred Astaire.[100] Rogers alleged right of publicity violations and also brought a Lanham Act claim against the defendant movie producer for "creating the false impression that the film was about her or that she sponsored, endorsed, or was otherwise involved in the film."[101] The court found in favor of the defendants on all claims, holding that the use of the names for the movie title was permissible.[102] In deciding the Lanham Act claims, the court employed an "artistic relevance" test, stating that uses of a celebrity's name in a movie title is protected by the First Amendment "unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [use] explicitly misleads as to the source or the content of the work."[103] The appellate court went on to elaborate that even if the use of a person's name implicitly suggests endorsement, when there is artistic relevance to the resulting work, the artistic expression prevails over the right of publicity claim.[104] In addressing the right of publicity claims, the court applied the same reasoning and added that relief would only be granted if the use of the individual's name or identity was "wholly unrelated" to the resulting work or the use was "simply a disguised commercial advertisement for the sale of goods or services."[105]

The Sixth Circuit in *ETW Corporation v. Jireh Publishing, Inc.*, several years later applied this "artistic relevance," as well as the "transformative" test to a dispute involving the sale paintings depicting famous golfers.[106] In *Jireh Publishing*, artist Rick Rush created a painting entitled *The Masters of Augusta*, commemorating Tiger Woods' victory at the Master Tournament in Augusta, Georgia.[107] The painting depicted Woods in three different swinging poses and also contained the faces of famous golfers who had previously won the tournament in the background.[108] The court, in examining the work, felt that the painting was not just a literal depiction of Woods.[109] The court found that there was artistic relevance in the underlying work because the painting portrayed an

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1996) and Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989)).

99 875 F.2d 994 (2d Cir. 1989).

100 *Rogers*, 875 F.2d at 996.

101 *Id.* at 997.

102 *Id.* at 1005.

103 *Id.* at 999.

104 *Id.* at 1000.

105 *Rogers*, 875 F.2d at 1004 (citing Frosh v. Grosset & Dunlop, Inc., 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980)).

106 *See generally Jireh Publ'g.*, 332 F.3d at 915-58.

107 *Id.* at 918.

108 *Id.*

109 *Id.* at 936.

important and historic sporting event and Rush's addition of the past tournament winners in the background "conveys the message that Woods himself will someday join the revered group."[110] With regards to the "transformative" test, the court simply stated that since the work was not a literal depiction of Woods and consisted of a collage of multiple images and faces, the painting had substantial transformative elements.[111] Ultimately, the court held that the painting did not violate Woods' right of publicity because "Rush's work has substantial informational and creative content which outweighs any adverse effect on ETW's market."[112]

D. The "Predominant Purpose" Test

In *Doe v. TCI Cablevision*,[113] Defendant Todd McFarlane created a violent fictional character named "Anthony 'Tony Twist' Twistelli" for his popular comic book *Spawn*.[114] The character shared the same name as Anthony Twist, a former profession hockey player of the National Hockey League.[115] Even though the character bore no physical resemblance, McFarlane admitted to naming the comic book character after Twist.[116] Once Twist was aware of the existence of the character, he filed for an injunction and sought damages for misappropriation of his name.[117] The Supreme Court of Missouri, in recognizing that this was a right of publicity claim, declined to apply the "transformative" test, but instead adopted a "predominant purpose" test proposed by a recent law review article.[118] The law review article suggested the following test to apply in cases where use of an individual's name or likeness is both expressive and commercial:

> 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 purpose of the product is to make an expressive comment on or about a celebrity, the expressive values should be given greater weight.[119]

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110 *Id.*

111 *Jireh Publ'g*, 332 F.3d at 938.

112 *Id.* at 937.

113 110 S.W.3d 363 (Mo. 2003).

114 TCI Cablevision, 110 S.W.3d at 364.

115 *Id.* at 365.

116 *Id.* at 366-67.

117 *Id.* at 368.

118 *Id.* at 374 (referring to Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity – Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 493 (2003)).

119 *TCI Cablevision*, 110 S.W.3d at 374 (quoting Lee, *supra* note 118, at 500).

The court, in applying this test, found that the predominant purpose of McFarlane in naming his comic book character "Anthony 'Tony Twist' Twistelli" was to obtain a commercial advantage by attracting consumer attention to the product and found in favor of the former hockey player.[120]

E. Relevant Problems in the Applications of Existing Tests

The "actual malice" test as applied by the *Hoffman* court may have been too narrow. The test fails to consider and establish standards for determining the distinction between commercial and noncommercial speech.[121] By merely focusing on the mindset of the defendants at the time of the use and requiring a "reckless disregard for the truth,"[122] the test is inadequate to balance the right of publicity and the First Amendment. For example, by placing a disclaimer on any product or advertisement that the use portrays an inaccurate or false impression, the test would automatically invoke the protection of the First Amendment.[123] Consequently, widespread applications of the "actual malice" test would greatly disfavor the right of publicity of individuals whose names and identities are used for some commercial purpose.

Since the *Comedy III* decision in 2001, the "transformative" test has been the subject of heavy criticism.[124] Lower courts within the same jurisdiction that have attempted to apply the test have struggled to determine whether a work is sufficiently "transformative" enough to defeat a right of publicity claim.[125] In addition, some critics claim that the decision fails to provide a clear standard since application of the elements of the copyright fair use doctrine in courts are unpredictable and inconsistent.[126] Other commentators argue that the decision and the transformative test are far too narrow since the case involved an artist's "nearly photographic reproduction" of the comedic trio.[127] Scholars also believe that the ambiguity of the "transformative" test will create a chilling effect on the creation of future artistic works involving well-known

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120 *TCI Cablevision*, 110 S.W.3d at 374.

121 Ham, *supra* note 30, at 569.

122 *Hoffman*, 255 F.3d at 1186 (citing Harte-Hanks Comme'n, Inc. v. Connaughton, 491 U.S. 657, 667 (1989)).

123 Casondra Kevorkian, *Reinterpreting Jurisprudence: The Right of Publicity and Hoffman v. Capital Cities/ABC, Inc.*, 37 LOY. L.A. L. REV. 85, 95 (2003).

124 Jasmer, *supra* note 20, at 303-04.

125 *See* Lee, *supra* note 118, at 493 (citing Winter v. D.C. Comics, 121 Cal. Rptr. 2d 431, 441-42 (Ct. App. 2002) (referring to the California appellate court's inability, as a matter of law, to determine whether a work was sufficiently transformative)).

126 Jasmer, *supra* note 20, at 303-04.

127 *Jireh Pub'g*, 332 F.3d at 938 (commenting on *Comedy III*). *See also* McMillen & Atkinson, *supra* note 50, at 139.

celebrities and athletes.[128] In sum, because of the court's failure to perform an in-depth analysis, the "transformative" test established, under the facts of *Comedy III,* provide inadequate guidance for future courts to uniformly apply.[129]

The "artistic relevance" test has also shared a great deal of criticism.[130] If applied too broadly, celebrities and athletes stand to dramatically lose endorsements and licensing rights to their names and images.[131] Rather than seek authorization from celebrities and athletes, advertising and manufacturing companies who utilize famous images for financial gain, can circumvent the right of publicity by merely adding some artistic element.[132] In this sense, the "artistic relevance" test may provide too much protection for artists and companies that use the name of another by not considering the effect of the use on the individual. Similar to the "transformative" test, the "artistic relevance" test "give[s] too little consideration to the fact that many uses of a person's name and identity have both expressive and commercial components. The tests operate to preclude a cause of action whenever the use of the name and identity is in any way expressive, regardless of commercial exploitation."[133]

With regards to the "predominant purpose" test adopted from a law review article, the author admits that such a test "would, doubtless, be difficult to apply in many circumstances."[134] The test seems to favor protecting the celebrity or athlete over First Amendment rights.[135] One commentator suggests that artists make a living by selling their art, and therefore, the works can be considered commercial.[136] Thus, strict applications of the "predominant purpose" test would likely cause a chilling effect on artists who specialize in creating "expressive works of movie stars, athletes, or political heroes."[137] Another critic of the test points to the accepted view that when noncommercial and commercial speech are inextricably intertwined, the speech is considered noncommercial as a matter of law and thus, entitled to First Amendment protection.[138]

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128 Jasmer, *supra* note 20, at 303-04.

129 *Id.*

130 *See* McMillen & Atkinson, *supra* note 50, at 139.

131 *Id.*

132 *Id.*

133 *TCI Cablevision,* 110 S.W.3d at 374 (referring to the "transformative" test).

134 Lee, *supra* note 118, at 500-01.

135 Michael S. Kruse, *Missouri's Interfacing of the First Amendment and the Right of Publicity: Is the "Predominant Purpose" Test Really that Desirable?,* 69 MO. L. REV. 799, 815 (2004).

136 *Id.*

137 *Id.*

138 Beall, *supra* note 98, at 32 (citing Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988)).

IV.
ADOPTING A 'FAIR USE' DEFENSE TO RIGHT OF PUBLICITY CASES

Many scholars have considered the importation of the copyright fair use doctrine into right of publicity law.[139] Courts have also relied on particular factors of the fair use doctrine in order to establish workable standards.[140] One court even went as far to state that "fair use can provide a reasonable, systematic, and consistent frame of reference for evaluating right of publicity matters."[141] Likewise, there also have been several arguments against the incorporation of the fair use doctrine in right of publicity cases.[142] Some protesters state that some of the factors can only be applied to a fixed tangible medium of expression.[143] Others state that the fourth factor, the effect of the use upon the potential market, will always fall in favor of finding a right of publicity violation.[144] However, an application of a modified fair use doctrine might alleviate some, if not all of these issues and provide a more adequate test for right of publicity cases. This section explores the fair use doctrine as it is used in copyright law and suggests that a modified fair use doctrine be adopted.

A. Copyright Law and the Fair Use Doctrine

Copyright law at one point in time faced very similar issues to right of publicity claims regarding the conflict between copyright protection and the First Amendment.[145] To alleviate this conflict, the fair use doctrine was adopted.[146] Codified as a four part test by the Copyright Act of 1976, the doctrine is intended to provide a "privilege to use copyright material in a way that otherwise would be a violation of the copyright monopoly."[147]

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139 *See* Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 604 (1996) ("I would find a model for one such test in the 'fair use' doctrine of copyright law."). *See also* Jasmer, *supra* note 20, at 305 (citing Gil Peles, *Comedy III v. Saderup*, 17 BERKELEY TECH. L.J. 549, 566 (2002)) ("Another suggestion is simply to apply the entire 'fair use' standard used in copyright law to any right of publicity claim.").

140 *See Comedy III*, 21 P.3d at 808 (relying on the first fair use factor to find justification for the "transformative" test).

141 Apple Corps Ltd. v. Leber, 229 U.S.P.Q. 1015, 1017 (Cal. Super. Ct. 1986).

142 *See Comedy II*, 21 P.3d at 808 ("It is difficult to understand why these [fair use] factors would be especially useful for determining whether the depiction of a celebrity likeness is protected by the First Amendment.").

143 *Id.*

144 Jasmer, *supra* note 20, at 323.

145 Gil Peles, *The Right of Publicity Gone Wild*, 11 UCLA ENT. L. REV. 301, 312 (2004).

146 *Id.* at 323.

147 Douglas J. Ellis, *The Right of Publicity and the First Amendment: A Comment on Why Celebrity Parodies are Fair Game for Fair Use*, 64 U. CIN. L. REV. 575, 599 (1996).

The act states that:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include – (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[148]

The first factor is the purpose and character of the use.[149] As stated by the Copyright Act of 1976, use of a copyrighted work for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," generally weighs the first factor towards finding fair use.[150] However, with regards to this factor, courts additionally consider whether the use is significantly transformative and whether it is for commercial or non-commercial purposes.[151] For example, the Supreme Court in *Campbell v. Acuff-Rose Music*, [152] in examining the use of a copyrighted song for parody purposes stated that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a find of fair use."[153] The Court, in finding that the parody was made strictly for commercial purposes, which weighs against a finding of fair use, held that it was error for the lower appellate court to conclude that the commercial nature of the parody alone rendered it presumptively unfair and in doing so, stressed the importance of considering the other fair use factors before making a determination of fair or unfair use.[154]

The second factor examines the nature of the copyrighted work.[155] Since the purpose of copyright law is to "promote science and the arts," fictional copyrighted works are afforded more copyright protection, as opposed to factual works.[156] As articulated by the Supreme Court, "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."[157] Therefore, the use of a factual copyrighted

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148 The Copyright Act of 1976, 17 U.S.C. § 107 (2003).

149 *Id.* at § 107(1).

150 *Id.* at § 107.

151 *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 584-85 (1994).

152 *Id.*

153 *Id.* at 579.

154 *See id.* at 586-90, 594.

155 17 U.S.C. § 107 (2003).

156 *Campbell*, 510 U.S. at 579.

157 *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 563 (1985).

work would more likely weigh in favor of a finding of fair use.

The third factor of the fair use doctrine is the amount and substantiality of the portion used of the copyrighted work.[158] The factor examines whether the "quantity and the value" of the copyrighted work used are "reasonable in relation to the purpose of the copying."[159] "Here, attention turns to the persuasiveness of a [copier]'s justification for the particular copying done, and the inquiry will harken back to the first of the statutory factors, . . . that the extent of permissible copying varies with the purpose and character of the use."[160] In circumstances where the entire copyrighted work was not used, the focus shifts to whether the "heart" of the original work was appropriated.[161] Thus, even though the use of an entire copyrighted work may favor a finding of unfair use, the copier may still defend that use based on the purpose.

Regarded by the Supreme Court as "undoubtedly the single most important element of fair use,"[162] the fourth factor analyzes the effect of the use upon the potential market for or value of the copyrighted work.[163] This factor requires a court to analyze not just the market impact of the use on the copyrighted work but also "whether unrestricted and wide-spread conduct of the sort engaged by the defendant" would detrimentally affect the potential market of the original copyrighted work.[164] In considering this factor, courts consider economic market harm by examining the possibility of a decrease in the original copyrighted work's sales potential.[165] Uses that are transformative, since they serve a different market function and at many times are directed to different consumers, thus favors a finding of fair use.[166]

Overall, the four factors of the copyright fair use doctrine are "the most clearly articulated approach to reconciling property and speech interests in the intellectual property field."[167] Each factor must be applied by a case-by-case analysis and weighed individually and then considered together in order to protect the purposes of copyright.[168] Facing the same issues as copyright law once did with the First Amendment, the right of publicity area of law should borrow the concepts and rationale of copyright

158 17 U.S.C. § 107 (3).
159 *Campbell*, 510 U.S. at 586.
160 *Id.* at 586-87.
161 *Id.* at 587.
162 *Harper & Row*, 471 U.S. at 566.
163 17 U.S.C. § 107 (1992).
164 *Campbell*, 510 U.S. at 590 (citing *Harper & Row*, 471 U.S. at 569).
165 *See* Ham, *supra* note 30, at 565.
166 *Id.*
167 *See* Lee, *supra* note 118, at 481-82.
168 *Campbell*, 510 U.S. at 577-78.

law's fair use doctrine in order to achieve the same balance.[169]

B. Adopting a Right of Publicity Fair Use Doctrine

I propose that a right of publicity fair use doctrine be adopted to properly balance First Amendment rights and the right of publicity. The three factors for the doctrine would be: 1) nature of the individual's celebrated status 2) the purpose and character of the use of the individual's identity; and 3) the potential effect of the use on that individual's identity.

The first factor would be an examination of the nature of the individual's celebrated status. Courts have stated that one of the purposes of right of publicity protection is to prevent unjust enrichment and thief of an individual's good will.[170] This factor is deeply intertwined with the "predominant purpose" and "actual malice" test, in that it would require the court to analyze why the user appropriated the individual's name or likeness. In assessing this factor, the court would have to determine the purpose of the use and then whether that purpose was to profit strictly on the individual's good will or deliberately mislead consumers to create a false impression. Naturally, it would be most enticing for businesses and advertisers to use the identity of famous persons, since they are in the public spotlight. Thus, this factor also would consider how the individual is known and to what capacity to the public, in relation to how the individual's identity is used. For the purposes of this factor, if the use is not related to why or how the individual is known to the public, then it is more likely that the user is being unjustly enriched by the good will of the individual. If the use is related, then analysis of the other two factors would help to determine whether the use is a fair use. For example, if a famous graceful dancer was parodied in a commercial by a distasteful dancer, then the distasteful dancer is less likely riding on the famous dancer's good will as opposed to having an impersonator of the famous dancer in a commercial advertising a product unrelated to dancing. In summary, if the use of the identity relates to how the individual is known, the more likely this factor weighs in favor of an unfair use.

The second factor of the right of publicity fair use doctrine would be the purpose and character of the use of the individual's identity. As explained in *Comedy III*, the ideals and rationale for considering this factor are the same as the "transformative" test.[171] By using an individual's identity and creating a new expression or message by adding something new, the right of publicity goal of encouragement of free expression and

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169 *See generally* Peles, *supra* note 145 (suggesting a right of publicity fair use test through a two-pronged analysis).

170 *See supra* note 70 and accompanying text.

171 *See supra* note 96 and accompanying text.

creativity are achieved.[172] The court in assessing this factor, must determine whether the use is sufficiently transformative enough to manifest the user's own artistic expression and whether the use is for commercial or non-commercial purposes.[173] Additionally, borrowing from copyright law, a use of an individual's identity for the purposes such as criticism, comment (including parody), teaching or research should also weigh this factor in favor of finding fair use.[174] Therefore, as in the copyright fair use doctrine, considering these purposes, the more transformative a use of an identity is, the more likely this factor favors finding fair use.

Closely related to the second factor and perhaps the most important factor, the last element would be the potential effect of the use on that individual's identity. The right of publicity is meant to protect the commercial value of an individual's identity.[175] As a result, this factor would appropriately examine how the particular use and similar "unrestricted and wide-spread"[176] uses affects the *individual's identity.* This factor also bears the same principals as the "actual malice" and "predominant purpose" tests by considering whether the defendant intentionally exploited and usurped the commercial value of the individual's identity and thereby causing a resulting injury.[177] For example, in right of publicity cases involving celebrities and athletes, unauthorized exploitations of their identities in a negative or false light could greatly cost them lucrative endorsements and sponsorships opportunities.[178] Furthermore, the purpose of right of publicity is not to prevent hurt feelings or humiliation.[179] Absent the showing of anything more than emotional distress, this factor would weigh in favor of the appropriator of the individual's identity.

As with the preexisting tests, this is not to say that adopting these factors will establish clear guidelines. However by incorporating all the mentioned tests into one balancing test standard, the courts would be better able to consider all the relevant issues. Just as the copyright fair use doctrine is regarded as a limitation on the monopoly granted by copyright protection,[180] the suggested modified fair use test would afford some

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172 *Comedy III*, 21 P.3d at 808.

173 *See supra* notes 96, 151 and accompanying texts.

174 *See supra* note 150 and accompanying text.

175 *Haelan.*, 202 F.2d at 868.

176 *See* note 164 and accompanying text.

177 *See* note 120 and accompanying text.

178 Dannean J. Hetzel, *Professional Athletes and Sports Teams: The Nexus of Their Identity Protection*, 11 SPORTS LAW. J. 141, 155 (2004).

179 *Cardtoons*, 95 F.3d at 976.

180 John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 495 (2005).

protection to celebrities and athletes, while at the same time allow others to use their likenesses in a manner that ultimately results in creativity and protects progress of the arts. One case has already briefly considered all these factors in a right of publicity dispute without actually establishing them as elements.

In *Cardtoons v. Major League Baseball Players Association*,[181] a parody trading cards company produced trading cards containing caricatures of famous baseball players and humorous commentary about their careers, ridiculing the players using a variety of themes.[182] The Major League Baseball Players Association claimed that these cards violated the players' right of publicity.[183] The United States Court of Appeals for the Tenth Circuit found that parody trading cards of famous baseball players fell within the scope of First Amendment protection and outweighed the players' right of publicity.[184] Among other considerations in the court's analysis, the court noted that the parody cards had commentary related to the individual's career and reputation in professional baseball world.[185] The court also stated that parody as a form of self-expression was an invaluable means to social criticism in the market place of ideas and that within the cards, the company had added "a significant creative component of its own to the celebrity identity and created an entirely new product."[186] Finally, in reaching its conclusion that the parody cards were privileged under the First Amendment, the court reasoned that "even without the right of publicity rights, celebrities would still be able to reap financial reward from authorized appearances and endorsements."[187] Ultimately, the court in *Cardtoons* arrived to the right conclusion by considering all the appropriate factors and finding that all the suggested factors in the proposed standard weighed in favor of the parody card company.

V.

CONCLUSION

Had the First Amendment issue been raised in the *Ali* case mentioned earlier, one has to wonder whether the outcome would have been different. Applying the three factors of the proposed right of publicity fair use doctrine, the district court might have found that the Ali's parody portrait related to his boxing career, that the portrait was an artistic

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181 95 F.3d 959 (10th Cir. 1996).

182 *Cardtoons*, 95 F.3d at 962-63.

183 *Id.* at 962.

184 *Cardtoons*, 95 F.3d at 976.

185 *Id.* at 962.

186 *Id.* at 972, 976.

187 *Id.* at 974.

expression used for commentary purposes, and would not have greatly affected his identity's potential market value. Overall, an examination of how some courts have tried or refused to develop a workable standard indicates that these courts have appropriately recognized the undeniable tension that exists between the right of publicity and First Amendment rights. By adopting a right of publicity fair use doctrine similar to copyright law, courts will be better able to balance the unauthorized use of one's identity, while at the same time protect First Amendment rights. Additionally, adoption of this standard is essential in order to provide adequate protection to individuals whose name or likenesses are used, encourage creative artistic expressions, and to provide a more uniform body of intellectual property law.