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The Right to Be Left Alone: Integration of the Four Publication-Based Tort Actions

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THE RIGHT TO BE LEFT ALONE: INTEGRATION OF THE FOUR PUBLICATION-BASED TORT ACTIONS

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I. INTRODUCTION

This article was born of the author's alarm regarding the expanding definition of the right of publicity, a right which has escaped all reasonable boundaries, posing a threat to the First Amendment and the free marketplace of ideas. Most of the damage has been caused by federal courts, particularly the Ninth Circuit, which purport to apply state law. For example, a 1992 Ninth Circuit case held that a Samsung Electronics advertisement, in which a robot in an evening gown spun the "Wheel of Fortune," violated Vanna White's right of publicity.[1] An inquiry into the right of publicity requires a retracing of its historical progression back to its roots,—the right to privacy—and leads to the study of two siblings of the right of publicity: (1) false light in the public eye and (2) public disclosure of private facts. Both are privacy actions that, like the right of publicity, are based on publication.[2]

The first draft of this article dealt solely with the right of publicity. Upon the realization that it was impossible to make any coherent recommendations with respect to the right of publicity without considering the impact on all three publication-based privacy actions, this article grew accordingly. Later, it also became evident that the article integrate defamation (both slander and libel) into the analysis, since defamation implicated equivalent rights and is also based on publication. During this evolutionary process, it became the author's conviction, and the thesis of this article, that the four publication-based tort actions should be integrated into one cause of action based on the same prima facie case and defenses. The publication-based tort actions are currently splintered through an

1. White v. Samsung Elecs. Am., 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

2. A third sibling, invasion of privacy, is not based on publication and is not discussed in this article.

historical anomaly of different phrasing of the same issue in different cases. It is as though a battery caused by a punch to the stomach and a battery caused by a punch to the face are separate causes of action simply because of the different words used to describe each punch.

This article sets forth a unified framework of analysis that integrates the four publication-based tort actions. The author's hope is that application of this analysis will lead to a uniform and consistent body of law and, more importantly, to the courts' recognition and application of uniform defenses necessary to protect the First Amendment and the free flow of ideas.

II. THE SOURCE OF THE ACTIONS

The philosophers of the Enlightenment Period of the Eighteenth Century created an awareness that we own ourselves and our labor, and that we are our most significant property.[3] These principles were a mainstay in the founding of our Republic and found direct expression in the Declaration of Independence, which states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.[4]

These sentiments found legal expression in an historic article written over one hundred years ago by Louis Brandeis and Samuel Warren, in which they argued for legal recognition of the right of privacy.[5] Although the article focused on the right to be free from public disclosure of private facts, it was described as "part of the more general right to the immunity of the person,—the right to one's personality."[6] Stated succinctly, they described this fundamental right as "the right to be let alone."[7] This liberty encompassed a broad array of personal rights, including the right to be free from defamation, a tort that had existed for some time and had by then been codified as a statutory cause of action in most states.[8]

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3. *See* DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 15-33 (1777).

4. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

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

6. *Id.* at 207.

7. *Id.* at 193.

8. *See* CAL. CIV. CODE §§ 44-48.9 (West 1993) (originally enacted in 1872).

Seventy years later, William Prosser argued that the right to privacy had become splintered into four separate actions:[9]

(1) *Invasion of privacy*, which requires some intrusion, generally physical, into the personal privacy of the plaintiff. Because this cause of action does not require publication, it is not discussed in this article;

(2) *Public disclosure of private facts*, which requires publication of private facts regarding the plaintiff;

(3) *False light in the public eye*, which requires a publication that imputes or implies some objectionable falsehood regarding the plaintiff; and

(4) *Appropriation*, which requires the appropriation, for the defendant's benefit or advantage, of the plaintiff's name, image, voice, or likeness (collectively referred to herein as "persona"). This cause of action came to be known as the right of publicity.

Prosser's formulation was accepted by the courts, and the law developed independently for each cause of action as well as for defamation, causing differences and anomalies between them.

The right of publicity, in particular, took its own turn when some states, including New York and California, enacted statutory recognition of the right.[10] In addition, courts have not been consistent in their general approach to dealing with these statutes. In some cases, the courts read the statutes in a mechanical manner and reached conclusions that were diametrically opposed to the conclusions reached under the common law in the same opinion.

For example, in California, where the statute is non-exclusive, the Ninth Circuit has held that an imitation of someone's persona is not actionable under the governing statute even though it is actionable under common law.[11] Other courts, however, have interpreted the governing statute more broadly to include imitations.[12] It is submitted that when the statute is non-exclusive, the latter approach is the correct one; the statutory provisions should, to the maximum extent possible, be interpreted to correspond with the common law in order to create a uniform, predictable body of law. For example, any defense that applies to the common law

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9. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

10. *See, e.g.*, CAL. CIV. CODE § 3344 (West 1993) (non-exclusive; coexistent with common law); N.Y. CIV. RIGHTS LAW § 51 (Consol. 1993).

11. White v. Samsung Elecs. Am., 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993) (robot in evening gown spinning the "Wheel of Fortune"); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (imitation of voice).

12. Ali v. Playgirl, Inc., 447 F. Supp. 723, 726 (S.D.N.Y. 1978) (phrase "portrait or picture" in the New York statute interpreted to include representations recognizable as a likeness of the plaintiff, including cartoon drawings).

cause of action should apply to the statutory cause of action, and any defense that applies to the statutory cause of action should apply to the common law cause of action.

In addition to the common law and statutory sources, the California Constitution was amended in 1972 to expressly refer to a right to privacy,[13] and this provision has been held to be a separate source for permitting a civil cause of action.[14]

III. THE PERSONAL NATURE OF THE ACTIONS

For each publication-based tort action, the harm to the plaintiff is a personal one based on a violation of the "right to be let alone." It is irrelevant that this personal injury can be stated in different ways depending on the facts (e.g., harm to reputation or harm to emotions). It is no more relevant that a punch to the face may cause the nose to bleed, and a punch to the stomach may cause one to buckle over; both are physical injuries caused by the same tort—battery. This personal nature of the harm applies even to an action based on appropriation. Since this action came to be known as the right of publicity, some courts phrase the right as the exclusive right to exploit one's persona and to prevent others from doing so without payment. This formulation puts a demonstrably commercial spin on the right and implicates economic, not personal, injury. This commercial formulation, however, overlooks the ultimate source of the right, which is the *personal* "right to be let alone." For this reason the right of publicity is not limited to celebrities or public figures but applies to private citizens as well.[15] Even in the classic case of a celebrity bringing an action for the commercial use of his or her persona, the facts frequently state that the dispute is not for lack of payment; rather, the celebrity is offended by any commercial use of his or her persona.[16]

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13. CAL. CONST. art. I, § 1.

14. Porten v. University of San Francisco, 64 Cal. App. 3d 825 (1976).

15. Howell v. New York Post Co., 612 N.E.2d 699 (N.Y. 1993); Maheu v. CBS, 201 Cal. App. 3d 662 (1988) (assumed without discussion); Stilson v. Reader's Digest Ass'n, 28 Cal. App. 3d 270 (1972), *cert. denied*, 411 U.S. 952 (1973) (listing sweepstake finalists without permission); Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82 (1955) (a private citizen has a cause of action if they are listed, without consent, as endorsing a particular product). *But see* Brewer v. Hustler Magazine, 749 F.2d 527 (9th Cir. 1984) (incorrectly concluding that the right applies only to celebrities).

16. *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

Since the publication-based tort actions are based on personal, rather than economic harm, the actions should be confined to individuals; corporations and other entities do not suffer the type of personal harm the actions were meant to remedy. In addition, there is already a well-defined body of law—trademark law, unfair competition, and trade disparagement—designed to protect corporations and other entities from the improper use of their corporate personae. Because the publication-based tort actions remedy a personal harm to the plaintiff, the actions die with the plaintiff under the common law.[17] Some states, however, have extended the right of publicity to heirs by statute, again reflecting incorrectly a commercial formulation of that right.[18]

IV. THE UNIFIED NATURE OF THE ACTIONS

The inordinate amount of confusion surrounding the scope of the separate publication-based tort actions, and the differences between them, stems from the fact that they are different paths to the same goal and represent different ways to state the same elements of the same cause of action. If the four publication-based tort actions are summarized by their common elements, they become one cause of action triggered by an *offensive publication regarding the plaintiff.*

A. Offensive

One requirement of all the publication-based tort actions is that the publication regarding the plaintiff be offensive to a reasonable person. This requirement is the essence of defamation,[19] and it is expressly stated as an element of the action based on public disclosure of private facts[20] and of the action based on portraying plaintiff in a false light in the public eye.[21]

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17. Lugosi v. Universal Pictures, 25 Cal. 3d 813 (1979) (right of publicity); Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718 (1958) (defamation).

18. *See* CAL. CIV. CODE § 990 (West 1993).

19. CAL. CIV. CODE § 45 (West 1993); Patton v. Royal Indus., 263 Cal. App. 2d 760 (1968); Megarry v. Norton, 137 Cal. App. 2d 581 (1955).

20. Gill v. Hearst Publishing Co., 40 Cal. 2d 224 (1953).

21. Strickler v. National Broadcasting Co., 167 F. Supp. 68 (S.D. Cal. 1958).

1. Presumed If Commercial Use

For right of publicity cases, as with false light cases, it is the context, not the text, of the publication that is deemed to be offensive. For example, a false light case might involve the placement of an innocent plaintiff's photograph within an article on drug dealers, with no express statement that the plaintiff is a drug dealer. The offensive element is supplied by the context, not the text, of the publication, as it creates an implied association that is offensive to a reasonable person. Similarly, the unauthorized use of someone's persona for a commercial use creates an implied association that should be presumed offensive.

In applying this presumption, the definition of "commercial use" could be taken, by analogy, from California's statutory codification of the right of publicity, which applies to any use of someone's persona "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services."[22] In order for the definition of "products, merchandise, and goods" not to become limitless, the definition must, contrary to current case law,[23] exclude newspapers, magazines, and television news (collectively referred to here as "News Sources"), although books, movies, television shows, posters, and the like should be included. This article will refer to any commercial use as described above (excluding News Sources) as a "Commercial Use."

2. Rebutting the Presumption

Although a Commercial Use should raise a presumption of offensiveness, it is rebutted based on the facts and circumstances. For example, it is common in the entertainment industry for companies to run advertisements congratulating celebrities on awards or achievements. In these cases, the presumption of offensiveness should be rebutted even if there is an express or implied association to the celebrity. Similarly, a book or movie may make reference to a person in a neutral or laudatory fashion, without the intention or appearance of any implied association, so the presumption of offensiveness should be rebutted.[24]

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22. CAL. CIV. CODE § 3344(a) (West 1993).

23. Eastwood v. Superior Court, 149 Cal. App. 3d 409 (1983) (the *National Enquirer* was a "product, merchandise, or good" within the statute).

24. This should have been, but was not, the reason the defendant prevailed in Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536 (1993) (surfing documentary).

The presumption is rebutted by mere incidental use of plaintiff's persona. For example, a twenty-seven second "clip" of the plaintiff's singing performance and a single mention of his name in a movie was held not actionable because it was an incidental use.[25] Similarly, a brief discussion of a plaintiff in a book is not actionable.[26] The California statute recognizing the right of publicity contains its own incidental use concept, which permits the use of any photograph or videotape of a person as part of a "definable group," including, without limitation, a crowd, audience, club, or team, as long as the individual has not been singled out in any manner.[27] This is a useful application of the incidental use concept and should be incorporated by case law into common law, just as the common law incidental use concept has been incorporated by case law into the statute.[28]

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

The presumption of offensiveness also is rebutted when there is no actual use or imitation of plaintiff's persona, since the implied association is too tenuous. This basis for rebutting the presumption of offensiveness is analogous to the idea/expression doctrine developed under the Copyright Act. Under this doctrine, the Copyright Act prevents the unauthorized use of the *expression* of an idea, but it does not prevent unauthorized use of the idea itself.[29] This doctrine is essential to protecting the free flow of ideas, which is an essential element of the fabric of our society and a necessary concomitant to developing and improving prior ideas.

To date, the right of publicity cases have permitted liability based on any indirect invocation of plaintiff's persona.[30] Application of the idea/

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

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

27. CAL. CIV. CODE § 3344(b) (West 1993).

28. *Johnson*, 43 Cal. App. 3d at 880.

29. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985).

30. White v. Samsung Elecs. Am., 971 F.2d 1395 (9th Cir. 1992) *cert denied*, 113 S. Ct. 2443 (1993) (advertisement with robot in evening gown spinning the "Wheel of Fortune" was actionable); Carson v. Here's Johnny Portable Toilets, 698 F.2d 831, 835 (6th Cir. 1983) ("Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used"); Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (use of

expression doctrine would protect any Commercial Use that did not involve the actual use or imitation of someone's persona. A drawing showing the features of the plaintiff would be actionable, even if highly stylized.[31] On the other hand, the mere fact that the plaintiff's persona is called to mind by reason of association would not be actionable. For example, any reference to the film *Terminator II* is likely to automatically call to mind Arnold Schwarzenegger, but such an indirect association should not be actionable. Were the rule otherwise, the free flow of ideas would be ground to a halt by those whose personas have any association to the ideas.

The most egregious case to date is the decision that Samsung Electronics violated Vanna White's right of publicity by an advertisement showing a robot in an evening gown spinning the "Wheel of Fortune."[32] Other than the evening gown, which is not an element of persona, the robot bore no resemblance to Vanna White. Thus, only the "idea" of Vanna White had been used. Since any reference to the show, "Wheel of Fortune," will almost always call to mind Vanna White, the court effectively granted her the exclusive right to any commercial reference to the show. Similarly, another case held that an advertiser violated a race car driver's right of publicity by using a highly modified photograph of his racing car in a cigarette advertisement.[33] Neither the driver nor his name could be seen, so this use should not have been actionable. Still another case held that the manufacturer of "Here's Johnny" portable toilets violated Johnny Carson's right of publicity.[34] While the phrase, "Here's Johnny," certainly calls to mind Johnny Carson, it is because of his famous introduction, not his name. For example, a portable toilet simply called "Johnny" would probably not invoke the association to Johnny Carson to the average person. Thus, it is idea association from his introduction, not the use of his name, that invokes the association to Johnny Carson.[35] In each of these cases, because of the tenuous link to the plaintiff, the public probably did not think that there was any actual association between the plaintiff and the product, so the presumption of offensiveness should have been rebutted.

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highly modified photograph of plaintiff's race car was actionable).

31. Ali v. Playgirl, Inc., 447 F. Supp. 723, 726 (S.D.N.Y. 1978) (cartoon drawing of Muhammad Ali).

32. *White*, 971 F.2d at 1396.

33. *Motschenbacher*, 498 F.2d at 821 (9th Cir. 1974).

34. *Carson*, 698 F.2d at 831.

35. *Id.* at 837.

B. Publication

Each publication-based tort action requires some oral, written, or pictorial publication targeted to one or more persons (other than the plaintiff).[36] The case law under the publication-based *privacy* actions, however, has added the requirement that the publication be "public,"[37] defined as publication to "a large number of persons."[38] This requirement appears plainly incorrect; while the number of persons receiving the information may be relevant to determining damages, the publication should be no less actionable simply because it was made to a small group or even one person. There still exists personal harm from both that disclosure and the risk of further dissemination. No one wants their personal "dirty laundry" aired before "only" their employer, so the integrated publication-based tort actions should not require a publication to be "public."

C. Regarding the Plaintiff

A reasonable person must understand that the publication refers to the plaintiff.[39] For example, a photograph or drawing of someone, without mention of their name, should not be actionable if a reasonable person could not recognize the individual from the photograph or drawing because of the pose, focus, or size.

V. DEFENSES

This section discusses the uniform defenses that should apply to the publication-based tort actions.

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36. Bindrim v. Mitchell, 92 Cal. App. 3d 61 (1979), *cert. denied*, 444 U.S. 984 (1979) (publication to one person is enough for defamation).

37. Warfield v. Peninsula Golf & Country Club, 214 Cal. App. 3d 646, 660 (1989); Porten v. University of San Francisco, 64 Cal. App. 3d 825, 828 (1976).

38. *Porten*, 64 Cal. App. 3d at 828 (disclosure of transcript to Scholarship and Loan Commission was not sufficient).

39. *Bindrim*, 92 Cal. App. 3d at 78 (citing the test from Middlebrooks v. Curtis Publishing Co., 413 F.2d 141, 143 (4th Cir. 1969)).

A. First Amendment

The First Amendment, if applicable to the facts, affords an absolute defense to the publication-based tort actions. Although publication-based tort actions often involve commercial speech, even commercial speech is protected by the First Amendment, albeit at a lesser level than other types of expression. The Supreme Court has stated: "[L]aws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny."[40] An example of a substantial state interest is the prevention of fraud or deception.[41] Thus, if the publication meets the requirements for protection under the First Amendment, it should not receive less protection simply because the publication is commercial speech unless it is fraudulent or deceptive.

1. Matters of Public Interest

The Supreme Court has held that the First Amendment provides an absolute defense to publication-based tort actions for reports on matters of public interest, unless the reports contain a knowing or reckless, as opposed to merely negligent, falsehood.[42] This protection applies to a broad range of expression in both News Sources and Commercial Uses, including magazine articles,[43] books,[44] and movies.[45] Advertisements, however, generally do not report on matters of public interest, so they rarely qualify for this defense. This is not a per se rule, however, and some advertisements may qualify for protection. Because the public interest defense does not apply to a knowing or reckless falsehood, it would generally not apply to false-light cases, which are premised on implied falsehood.

In order to provide broad First Amendment protection, the definition of "public interest" sweeps up any report regarding public figures and

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40. Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993) (citations omitted).

41. *Id.*

42. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defamation); Time, Inc. v. Hill, 385 U.S. 374 (1967) (public disclosure of private facts).

43. *Time, Inc.*, 385 U.S. at 374.

44. Maheu v. CBS, 201 Cal. App. 3d 662 (1988).

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

celebrities,[46] as well as reports regarding private citizens who become associated with some issue that has caught the public eye.[47] In determining what matters are of "public interest," there should be a presumption that a matter is of public interest if it appears in a News Source, although this presumption is rebuttable.[48] For example, the public interest defense has been used to protect a magazine photograph of a couple in a romantic pose as entertainment,[49] and the opinion can be explained on the basis of this presumption. No presumption, and indeed no public interest defense, should apply to the Commercial Use of photographs with no accompanying text or discussion, such as a poster, postcard, picture book, or advertisement, no matter how interested the public is in the photographs.

The statutory provisions recognizing the right of publicity provide a similar defense for use of one's persona in connection with any "news,"[50] which has been interpreted to be at least as broad as, if not broader than, the First Amendment protection for reports on matters of public interest.[51] The definition of "news" within the statute has been interpreted in a similar manner to the First Amendment defense by excluding reports that were knowingly or recklessly false.[52]

There are limitations, however, on the First Amendment defense for reports on matters of public interest. The Supreme Court has held that an unauthorized television news broadcast of an *entire* human cannonball act was not protected, because it caused a "substantial threat to the economic value of that performance."[53] This holding was based on the commercial formulation of the right of publicity as implicating an economic harm, and the decision should be limited to its facts (i.e., the unauthorized broadcast of an entire act).

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46. New York Times v. Sullivan, 376 U.S. 254 (1964) (defamation).

47. Howell v. New York Post Co., 612 N.E.2d 699 (N.Y. 1993) (photograph of well-known person, with plaintiff at her side, at psychiatric hospital); Dora v. Frontline Video, 15 Cal. App. 4th 536 (1993) (documentary on surfers); Time, Inc. v. Hill, 385 U.S. 374 (1967) (article about crime victims).

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

49. Gill v. Hearst Publishing Co., 40 Cal. 2d 224 (1953).

50. *See, e.g.*, CAL. CIV. CODE § 3344(d) (West 1993).

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

52. *Eastwood*, 149 Cal. App. 3d at 409.

53. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977).

2. Parodies

In *Hustler Magazine v. Falwell*,[54] the Supreme Court held that a parody, even a highly offensive one, of a public figure is protected by the First Amendment, except in the unusual case where a reasonable person would believe that the parody expresses a statement of fact, and the fact is untrue.[55] Although the *Hustler* decision dealt with an action for intentional infliction of emotional distress, the result would have to be the same under the publicity-based tort actions, or the decision would be toothless. In order to be protected, the parody should relate directly to the plaintiff; it should not be enough that the plaintiff's persona is used in connection with a parody of something other than the plaintiff, or the defense would become too broad.

In *White v. Samsung Electronics America*,[56] the Ninth Circuit held that the First Amendment parody defense did not apply to commercial advertisements.[57] This decision is plainly wrong. As discussed above, commercial speech is entitled to First Amendment protection, at least in the absence of fraud or deception, so the First Amendment parody defense should have protected the advertisement in question.

B. Express or Implied Consent

Another defense to the publication-based tort actions arises if the plaintiff gives express or implied consent to the publication.[58] Express consent is straightforward, but implied consent should be interpreted broadly, based on the expectations of a reasonable person in those circumstances. For example, actors in a movie should be held to implicitly consent to use of their personas in advertisements for the movie, just as those who pose for a picture should be held to implicitly consent to an intended use of the picture that they were aware of at the time. Similarly, those who become advisory or honorary members of a board of directors of a charitable organization should be held to implicitly consent to a listing of their name and capacity in an advertisement by the charitable organization. In addition, athletes in a game that they know is being televised should be held to implicitly consent to the televised broadcast and any

54. 485 U.S. 46 (1988) (highly offensive parody of religious leader).
55. *Id.* at 56.
56. 971 F.2d 1395 (9th Cir. 1992).
57. *Id.* at 1401.
58. Kapellas v. Kofman, 1 Cal. 3d 20 (1969).

subsequent broadcasts, outtakes, etc., that are within the reasonable contemplation of the athletes at the outset.

C. *Truthful Publication of Public Facts or Opinion*

Courts have held that the publication based *privacy* actions will not lie if the facts were already disclosed; this includes the publication of photographs of the plaintiff taken in public.[59] For defamation actions, this defense is stated in terms of "truth is a defense," but if the truth relates to private facts, the publication becomes actionable as a public disclosure of private facts. Thus, when the publication-based tort actions are integrated, the defense is based on truthful publication of public facts. This "truth" defense would not apply to any publication that creates a false implied association, such as an action based on false-light or any Commercial Use (unless the presumption of offensiveness is rebutted, in which case defenses are irrelevant).

Another aspect of the "truth" defense is the broad protection afforded the statement of opinions (as long as they do not state or imply some false or private fact), because opinions reflect the "truth" about the beliefs and views of the speaker.[60] If, however, the opinion goes beyond a truthful expression of the views of the speaker and expresses or implies a false or private fact, then it is not protected under this defense.[61]

D. *Privileged*

A defense to defamation exists if the publication is legally privileged, as when it occurs in the context of a legislative, judicial, or administrative proceeding.[62] This defense should apply uniformly to all the publication-based tort actions.

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59. Dora v. Frontline Video, 15 Cal. App. 4th 536 (1993) (applying this defense to a right of publicity claim by a surfer who appeared in a surfing documentary); Gill v. Hearst Publishing Co., 40 Cal. 2d 224 (1953).

60. Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 260 (1986).

61. *Id.* at 266.

62. *See, e.g.*, CAL. CIV. CODE § 47 (West 1993).

VI. NON-DEFENSES

Some defendants have argued for, and some cases have applied, improper defenses to the publication-based tort actions. This section analyzes these purported defenses and demonstrates why they should not be applicable.

A. Copyright Act Preemption

In a plainly erroneous decision, the Seventh Circuit held that the Copyright Act preempted a right of publicity claim by baseball players objecting to televised broadcasts of their games.[63] In reaching its decision, the court held that the players were the authors of the televised games within the meaning of the Copyright Act. However, a better view is that the author of a televised game is the production company that films the game.[64] The players were not the authors of the work; rather, they were the subject of the work.

The Copyright Act protects authors and owners of a work, while publication-based tort actions protect the subjects of a work. The Copyright Act and the publication-based tort actions protect entirely different interests. Therefore, Copyright Act preemption does not apply. For example, the Supreme Court has held that the unauthorized broadcast of an entire cannonball act was a violation of the right of publicity, even though the broadcaster undoubtedly owned the copyright in the broadcast.[65] Similarly, some courts have held that plaintiffs are not preempted by the Copyright Act from objecting to the imitation of their voice in a song on a commercial, even if the defendant has the valid right to use the words and music to the song under the Copyright Act.[66] Therefore, Copyright Act preemption should not have been a defense to the baseball players' cause of action; however, the case should have been decided the same way based on implied consent.[67]

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63. Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 940 (1987).

64. *See* 17 U.S.C. § 201(b) (1988).

65. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

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

67. *See supra* part V.B.

B. Disclaimers

It is common for commercials to imitate celebrity voices, usually in a jocular fashion, and then to end with the disclaimer, "celebrity voices impersonated." If such disclaimers were allowed as a defense, then the publication-based tort actions would be eviscerated. For example, an advertiser could use a perfect imitation of the plaintiff's voice in a song on a non-humorous commercial, and would rely on a disclaimer as a defense. This cannot be allowed. On the other hand, these disclaimers are typically used in connection with commercials that are parodies where it is obvious that it is not the real celebrity speaking. In these cases, the commercials should qualify under the First Amendment parody defense.[68]

C. Fair Use

It is also tempting to suggest a fair use defense based on analogy to copyright law or trademark law.[69] Both copyright law and trademark law, however, are based on the commercial concept of encouraging maximum effort for the overall good of society. Furthermore, they both address economic, not personal, injury. Since the publication-based tort actions address personal injury, the fair use analogy is not a good one. The concerns addressed by a fair use defense, however, are addressed by the elements of a prima facie case and the defenses set forth in this article, which should provide adequate breathing room for the free marketplace of ideas.

VII. EXAMPLES

It is useful to test the approach suggested in this article against real-world examples to see if the results are logical, predictable, and fair. The examples discussed below are all true, and the names, when used, have not been changed to protect the innocent. Many of the examples are based on the author's observation; others are based on case law. Most of the examples focus on Commercial Use, the breeding ground for most of the recent cases. Keep in mind that every Commercial Use creates (1) a presumption of offensiveness, (2) the inability to rely on a presumption of public interest, and (3) the inability to rely on the defense of truthful

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68. *See supra* part V.A.2.

69. *See* 17 U.S.C. § 107 (1988) (copyright); 15 U.S.C. § 1115(b)(4) (1988) (trademark).

publication of public facts (unless the presumption of offensiveness is rebutted, in which case defenses are irrelevant). The reader may want to decide how he or she would rule before reading the author's conclusion in each subsequent paragraph. In each case, the use is *without the express consent* of the plaintiff.

1. A picture of Al Unser appears on the cover of TWA Ambassador Magazine (an in-flight magazine) and his photographs accompany an auto-racing article in the magazine.

Because the photographs are used in connection with what is essentially a long advertisement for TWA as opposed to a normal magazine, it may be appropriate to treat the publication as a Commercial Use, not a News Source. However, even though the magazine may be Commercial Use, it nonetheless reports on a matter of public interest, auto racing, and Al Unser's photographs relate to that report, even the cover shot. Thus, the use should be protected under the First Amendment as related to a report on matters of public interest.

2. A picture of a one million dollars sweepstake winner appears in a newspaper with a simple caption that reads, "$1 million sweepstake winner receives check."

This non-Commercial Use does not meet the element of offensiveness, and in any event it should be protected under the First Amendment as a report on a matter of public interest by applying the rebuttable presumption of public interest suggested in this article for matters that appear in a News Source. If the picture were taken in public, the newspaper could also rely on the defense of truthful publication of public facts.

3. The same picture and caption appear in an advertisement by the company sponsoring the sweepstake.

This is a closer call. The photograph is now being used in connection with a Commercial Use, but it may be possible to rebut the presumption of offensiveness on these facts if the purpose is to congratulate the winner. The company could also attempt to defend the advertisement as a report on a matter of public interest, but if no News Source has reported on the sweepstake or its winner, this would be difficult. On the other hand, if a News Source has reported on the contest, then it should be protected as a report on a matter of public interest. Depending on the facts, the winner may also have implicitly consented to the use.

4. A picture of a couple on a beach, with the couple's features recognizable, appears in a travel advertisement.

This Commercial Use should be actionable, and no defense should apply.

5. A movie advertisement displays a photograph of its cast.

Although this is a Commercial Use, this is the most obvious application of the defense of implied consent.

6. A photograph of musicians appears in an advertisement for a radio station that plays their style of music.

This Commercial Use should be actionable, and no defense, including implied consent, should apply.

7. A billboard for Orkin Exterminators states: "Orkin: The Exterminator," with an image of what looks like a robot from the film *Terminator II*, but the facial features do not resemble anyone in the movie.

The presumption of offensiveness from this Commercial Use should be rebutted on these facts under the idea/expression doctrine because the robot does not resemble any of the actors in the film. If the robot had the obvious facial features of one of the actors, it should be actionable. It is also tempting to rely on the parody defense; however, the humor relates to the twist on the title of the film, *not* to the actors.

8. A movie advertisement quotes a rave review by Siskel & Ebert.

Since all critics know that this is a common practice, this Commercial Use should be protected by the defense of implied consent.

9. A restaurant decorates its walls with celebrity photographs.

There should be no defense to this Commercial Use, whether or not the celebrities have been to the restaurant. Consent should not be implied simply from dining there (unless the celebrities made their photographs available for this purpose). In addition, this is an example where multiple uses should not be treated as an incidental use of each one, so the presumption of offensiveness would not be rebutted.

10. A board game, "Faces," requires matching celebrities' pictures to their names.

No defense should apply to this Commercial Use. This is another example where multiple uses should not be treated as an incidental use of each one.

11. A book titled "Fame" features Madonna on the cover.

This Commercial Use should be protected under the First Amendment defense for reports on matters of public interest if there is some discussion of Madonna in the book.

12. A book contains only photographs and names of one or more celebrities, with no accompanying text.

This Commercial Use should not be protected as a report on matters of public interest because there is no textual discussion. The same pictures appearing in a News Source would be protected based on the presumption of public interest.

13. A board game is based upon baseball players' career statistics.

This Commercial Use should be protected as an incidental use because the career statistics are in the public domain, and it is impossible to discuss the statistics without mentioning the players. The public simply would not think that there is any actual association between the players and the game.

14. A picture of a couple kissing on a Paris street is made into a poster.

If the couple is not recognizable by a reasonable person, the element requiring a publication "regarding the plaintiff" would not be met, so there would be no prima facie cause of action. If the couple was recognizable, this Commercial Use would be actionable.

15. A company publishes a public domain book with the author's name and picture on the cover.

The use of the author's name in connection with this Commercial Use should be protected as an incidental use in connection with publication of the book, thus rebutting the presumption of offensiveness. However, use of the photograph goes beyond an incidental use and should be actionable.

16. Sting's picture appears in an advertisement for a concert hall where he performed.

No defense should apply to this Commercial Use, as merely appearing at a concert hall should not create implied consent to use of the person's photograph in advertisements.

17. A newspaper publishes a Doonesbury cartoon ridiculing Ross Perot.

Although offensive in fact, this use should be protected under the First Amendment parody defense.

18. A theater organization publishes an advertisement stating, "Thank you, Arnold Schwarzenegger," with his picture, to congratulate him for the success of a movie in which he appeared.

Although this is a Commercial Use, the presumption of offensiveness should be rebutted on these facts, because the purpose of the advertisement is to congratulate, not advertise.

19. An actor who looks very similar to a celebrity appears in an advertisement.

As long as a reasonable person would not think that the actor is, in fact, the celebrity, the presumption of offensiveness should be rebutted for this Commercial Use based on the idea/expression doctrine. The public would not think that there is any association between the celebrity and the advertisement. The use may also qualify for the First Amendment parody defense if there is humor directed at the celebrity.

20. Wok Fast restaurant publishes a billboard advertising their fast food, with a portrait of Darryl Gates, the former Los Angeles Chief of Police who would not leave office despite public pressure, with the caption "[F]or when you can't leave the office, or won't."

This is a good example of a Commercial Use that should be protected by the First Amendment parody defense.

21. Samsung Electronics publishes a commercial depicting a robot in an evening gown spinning the "Wheel of Fortune."[70]

The presumption of offensiveness should be rebutted for this Commercial Use based on the idea/expression doctrine. Even if the prima facie case were met, this use should be protected under the First Amendment parody defense.[71]

22. Playgirl publishes an unflattering cartoon of Muhammad Ali.[72]

Although offensive in fact, this use should be protected by the First Amendment parody defense.

23. An advertisement uses an imitation of a celebrity's voice on a song in a commercial.[73]

If a reasonable person would recognize the voice as the plaintiff's, then this Commercial Use meets the "regarding the plaintiff" element, and no defense should apply.

VIII. CONCLUSION

In summary, the publication-based tort actions are all rooted in the same fundamental "right to be let alone" and should all be integrated into one cause of action based on an offensive publication regarding the plaintiff. In defining the scope of this single cause of action, the same elements of the prima facie case and the same defenses should apply. In addition, any statutory expressions of the actions, such as the statutory recognition of defamation and the right of publicity, should be interpreted consistently with this unified cause of action. The current divergence in the judicial approaches to each publication-based tort action, as well as to the statutory actions, provides plaintiffs with too formidable an array of

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70. White v. Samsung Elecs. Am., 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

71. This is the same conclusion as was reached by Judge Alarcon in his concurring and dissenting opinion in *White*. *Id.* at 1407.

72. Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (finding liability).

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

weapons to attack any single publication. If the elements and defenses are porous and are not applied consistently, and they are not, as attested to by the slew of unwarranted plaintiff victories in right of publicity cases, then our robust free marketplace of ideas will leak through the pores, and we will all suffer for it.