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Bridgette Marie de Gyarfas

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RIGHT OF PUBLICITY V. FICTION-BASED ART: WHICH DESERVES MORE PROTECTION?

*Bridgette Marie de Gyarfás**

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* Law Clerk to the Honorable Alan M. Ahart and the Honorable Kathleen P. March, United States Bankruptcy Court, Central District of California. B.S., 1984, Arizona State University; J.D., 1994, Southwestern University School of Law. Member of the California Bar.

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I. INTRODUCTION

It is the position of this article that fiction-based art should be afforded less protection than fact-based art in the context of individual right of publicity cases.¹ This article examines the current First Amendment newsworthiness analysis used for right of publicity cases in California and evaluates why such a newsworthiness analysis is not sufficient for right of publicity cases where an individual's persona is appropriated to aid sales of fiction-based art.

Part I of this article suggests a five-factor analysis to be applied by the courts when confronted with deciding which is deserving of more protection: an individual's right of publicity or the creation of fiction-based art. Part II of this article provides a brief discussion of the right of publicity. Part III discusses the First Amendment newsworthiness defense as applied by the United States Supreme Court, the Ninth Circuit Court of Appeals, and California courts in right of publicity cases. Part IV explores why fiction-based works of art should not be given as much protection as fact-based works of art when balanced against an individual's right of publicity. Part IV also provides a multi-factored analysis to be used when balancing an individual's right of publicity against protecting the creation of fiction-based art. Part V applies the author's multi-factored analysis to two right of publicity cases involving fiction-based art, yielding two different outcomes.

1. Fiction-based art is deserving of some constitutional protection. *See Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Ct. App. 1983) ("All fiction is false in the literal sense that it is imagined rather than actual. However, works of fiction are constitutionally protected . . ."); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection.").

II. THE RIGHT OF PUBLICITY AND ITS POLICY BASES

The right of publicity is a species of the law of privacy. California adopted Dean Prosser's invasion of privacy analysis in 1969.² Prosser's analysis of the law of privacy is comprised of four different invasions upon the plaintiff:³ (1) "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs;"⁴ (2) "[p]ublic disclosure of embarrassing private facts about the plaintiff;"⁵ (3) "[p]ublicity which places the plaintiff in a false light in the public eye;"⁶ and (4) "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."⁷

The fourth invasion is the only one which recognizes and protects the commercial value of the plaintiff. This right of an individual to control the commercial opportunities endowed with his or her persona is commonly referred to as a "right of publicity."⁸ The right of publicity may be

2. See *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969).

3. Dean Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (Prosser states that these four different interests are "tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone.'").

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569 (1977) (holding that a right of publicity gives an individual "personal control over commercial display and exploitation of his personality and the exercise of his talents"); *Groucho Marx Prod., Inc. v. Night and Day Co., Inc.*, 689 F.2d 317, 318 (2d Cir. 1982) (holding that every person has a "right to exploit the commercial value of his name, likeness or attributes. . ."); *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.) (holding that if there were no right of publicity, "many prominent persons . . . would feel sorely deprived if they no longer received money" for use of their persona), *cert. denied*, 346 U.S. 816 (1953); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978) (describing a right of publicity as "the publicity value of one's name or likeness"); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 490 (Cal. 1990) ("Every person has a proprietary interest in his own likeness and that unauthorized, business use of likeness is redressible as a tort."), *cert. denied*, 499 U.S. 936 (1991); *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) (finding that the right of publicity "means in essence that the reaction of the public to name and likeness . . . endows the name and likeness of the person involved with commercially exploitable opportunities"). See also, Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1589 (1979) ("The right of publicity has been defined with surprising consistency by courts and commentators; it is generally conceived as comprising a person's right in the use of the name, likeness, activities, or personal characteristics.").

The use of the word "persona" for the purpose of this article is not to be defined narrowly to include only "name or likeness." The right of publicity has broadened its scope from protecting the original "name or likeness" to include protection of other identities such as an individual's image, an individual's voice, the use of a popular phrase, and the use of an object

narrowly defined as the right of a *celebrity* to control and profit from the commercial value of his or her persona.⁹ However, both California and Ninth Circuit case law disagree with the proposition that a right of publicity cause of action is only available to celebrities; it also exists for non-celebrities.¹⁰

commonly associated with a celebrity. *See* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1101-02 (9th Cir. 1992) (holding that Waits' voice was sufficiently distinctive and widely known to give him a protectable right in its use), *cert. denied*, 113 S. Ct. 1047 (1993); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (The court held that the use of a female-shaped robot wearing a blond wig, a long gown, and jewelry while standing in front of a game board containing block letters was sufficient to find Vanna White's common law right of publicity actionable. Citing Prosser, the court stated, "[i]t is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or likeness."), *cert. denied*, 113 S. Ct. 2443 (1993); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (stating that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California"); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (holding that the use of the phrase "Here's Johnny" was sufficient to identify Johnny Carson: "If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used. 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, 826-27 (9th Cir. 1974) (The court held that the unauthorized use of a picture of a well known race car which is associated with a well known race car driver violated his right of publicity. The markings on the car "were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff."). *See also*, J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4.9, at 4-49 (1993) (The term "persona" is used to encompass all aspects of a person's identity, which may include any combination of photograph, picture, voice, body movement, etc.).

9. *See, e.g.*, *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978) ("[The] right of publicity is usually asserted only if the plaintiff has 'achieved in some degree a celebrated status.'" (citations omitted)); Howard I. Berkman, Note, *The Right of Publicity: Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527, 533 (1976) (arguing that a non-celebrity should only be able to recover for injury to hurt feelings and not for the unauthorized use of his name or picture).

10. Both California and Ninth Circuit case law "assumes without discussion that the right [of publicity] exists" for a non-celebrity. *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 791-92 n.2 (Ct. App. 1993) (citing *Maheu v. CBS, Inc.*, 247 Cal. Rptr. 304 (Ct. App. 1988); *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194 (Cal. Ct. App. 1955)). *See, e.g.*, *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 n.11 (9th Cir. 1974) ("[I]t is quite possible that the . . . appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously economically valueless."). Over forty years ago, Melville Nimmer wrote the following in support of non-celebrities having a right of publicity cause of action:

It is impractical to attempt to draw a line as to which persons have achieved the status of celebrity and which have not; it should rather be held that every person has the property right of publicity, but that the damages which a person may claim for infringement of the right will turn upon the value of the publicity appropriated which in turn will depend in great measure upon the degree of fame attained by the plaintiff. Thus, the right of publicity accorded to each individual "may have much

The right of publicity was first recognized only forty years ago by the Second Circuit in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹¹ Today, both California¹² and the Ninth Circuit¹³ recognize common law¹⁴ and statutory¹⁵ rights of publicity.

or little, or only a nominal value," but the right should be available to everyone. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 217 (1954).

For an in-depth discussion on who is a celebrity and how the term "celebrity" encompasses more than the typical category of "movie idols, rock stars and ball players," see H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1 (1992); MCCARTHY, *supra* note 8, § 4.1, at 4-3 to 4-5.

11. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). In *Haelan*, the issue revolved around the right of Topps to display a baseball player's image on their baseball cards. *Id.* at 867. The Second Circuit distinguished between two different rights: the "right of privacy" and the "right of publicity." *Id.* at 868. The right of privacy protected the ballplayer from hurt feelings, while the right of publicity protected his economic interest in the commercial use of his image. *Id.*

12. See *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979); *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979); *Baugh v. CBS, Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790 (Ct. App. 1993) (recognizing a common law right of publicity, although the court found that *Dora's* case did not involve the "right of publicity" type of appropriation); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983).

Today, there are a total of 24 states that recognize either a common law or a statutory right of publicity. MCCARTHY, *supra* note 8, § 6.1[B], at 6-6. Out of the 24 states that recognize a right of publicity, 15 of them recognize the right as a common law right and the remaining nine recognize the right by state statute. *Id.* California recognizes both a common law and a statutory right of publicity. *Id.*

13. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

14. In California, the common law cause of action for right of publicity "may be plead by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983).

Appropriation has been described as being of two types. *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 791-92 (Ct. App. 1993). The first type is that of a right of publicity which involves "commercially exploitable opportunities." *Id.* The second type is that which "brings injury to the feelings, that concerns one's own peace of mind, and that is mental and subjective." *Id.*

15. The statutory remedy available for infringements of rights of publicity is provided for by California Civil Code §§ 3344 and 990. Unlike the California common law right of publicity, § 3344(a) requires that the additional element of intent be satisfied in order for an individual's right of publicity claim to be actionable. Cal. Civ. Code § 3344(a) (West 1993) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness. . .") (emphasis added); see also, *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983) ("In addition, to plead the statutory remedy provided in Civil Code § 3344, there must also be an allegation of a knowing use of the plaintiff's name, photograph or likeness.").

The United States Supreme Court has been confronted with a right of publicity case only once, in 1977.¹⁶ The Supreme Court, in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁷ upheld, in a five to four decision, the plaintiff's claim under Ohio common law in the face of a First Amendment defense.¹⁸ Three main policy reasons for the protection of Zacchini's right of publicity were advanced by the majority:¹⁹ (1) protecting the economic value of an individual's identity;²⁰ (2) preventing unjust enrichment to the infringer of an individual's identity;²¹ and (3) providing incentives to performers to produce entertaining or intellectual works.²² Thus, in balancing the First Amendment newsworthiness defense against the plaintiff's right to produce entertaining works, the First Amendment defense was outweighed.²³ Although the holding in the *Zacchini* case is well reasoned, it is unclear whether the holding provides any guidance to right of publicity cases where the defendant uses less than the performer's entire act.²⁴

Additionally, the California Court of Appeal has stated that "[a] 'direct' connection must be alleged between the use and the commercial purpose." *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 118 Cal. Rptr. 370, 381 (Ct. App. 1974) (holding that the defendant's use of a magazine article about plaintiff in defendant's textbook was not "so 'directly' connected with the sale" to have any substantial impact on the sale of the textbook, and thus does not fall within the ambit of § 3344).

Section 990 of the California Civil Code provides for the descendibility of a right of publicity claim. However, there is no common-law right of publicity concerning an individual who is already deceased. *Lugosi v. Universal Pictures*, 603 P.2d 425, 429 (Cal. 1979) (citing DEAN PROSSER, *LAW OF TORTS* 814-15 (4th ed. 1971); see discussion *infra*, note 165).

16. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In *Zacchini*, Hugo Zacchini's 15 second act as the "human cannonball" was videotaped by a television news reporter while at the county fair and was then subsequently shown on the evening news. *Id.*

17. 433 U.S. 562 (1977).

18. *Id.* at 578-79.

19. *Id.* at 575-77.

20. *Id.* at 575-76. See discussion *infra*, part II.A.

21. *Zacchini*, 433 U.S. at 576. See discussion *infra*, part II.B.

22. *Zacchini*, 433 U.S. at 576-77. See discussion *infra*, part II.C.

23. *Zacchini*, at 578-79.

24. Justice White, while stressing the strong policy reasons in favor of free access to newsworthy events, found that the First Amendment privilege asserted by the defendant did not immunize the broadcast company when it broadcast Zacchini's *entire act* without his consent. *Id.* at 569-77 (emphasis added). The majority stated that "[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." *Id.* at 574-75.

In the dissent, Justice Powell questions whether Zacchini falls within the Court's holding because it is unlikely that Zacchini's entire act took only 15 seconds. *Id.* at 579 n.1 (Powell, J., dissenting, joined by Brennan & Marshall, JJ.). There was probably some fanfare before and after the actual performance. *Id.*

There is another policy reason suggested by some commentators: recognizing a right of publicity helps promote truthful advertising and endorsements so as not to mislead consumers by falsely associating a celebrity with the use of a product or service.²⁵ Although promoting truthful advertising and endorsements is an important and sound rationale for recognizing the right of publicity claim, these concerns are not the focus of this article.²⁶

The three main policy reasons advanced by the majority in *Zacchini* are briefly discussed in Parts II.A, II.B, and II.C below in light of their applicability and usefulness to the right of publicity.

A. *Avoiding Dilution of the Economic Value of an Individual's Identity*

For most, becoming a person of prominence and notoriety requires expenditure of an enormous amount of time, energy, and money.²⁷ These individuals are constantly trying to "sell" themselves and their images to those with whom they wish to be associated. If we refuse to recognize an individual's property rights in his or her own persona, the public will, in essence, own that individual's persona.²⁸ If this "taking" by the public of an individual's persona occurs, then there is little, if any, economic value of that individual's identity.²⁹

25. James M. Treece, *Commercial Exploitation of Names, Likenesses and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 990 (1964).

26. For further discussion of this rationale, see MCCARTHY, *supra* note 8, § 2.4, at 2-14 to 2-16.

27. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Ct. App. 1983) ("Often considerable money, time and energy are needed to develop the ability in a person's name or likeness to attract attention and evoke a desired response in a particular consumer market.").

28. See Raymond H. Goettsch, Comment, *The Right of Publicity: Premature Burial for California Property Rights in the Wake of Lugosi*, 12 PAC. L.J. 987, 995-96 (1981).

29. Chief Justice Bird, in her dissent in *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979), cited to the rationale provided in James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Exploitation*, 51 TEX. L. REV. 637 (1973), to bolster her anti-dilution argument in favor of protecting an individual's right of publicity:

The loss may well exceed the mere denial of compensation for the use of the individual's identity. The unauthorized use disrupts the individual's effort to control his public image, and may substantially alter that image. The individual may be precluded from future promotions in that as well as other fields. Further, while a judicious involvement in commercial promotions may have been perceived as an important ingredient in one's career, uncontrolled exposure may be dysfunctional. As a result, the development of his initial vocation — his profession — may be arrested.

Lugosi, 603 P.2d at 438 (Bird, C.J., dissenting).

For an individual of "celebrity" status, the public's unrestricted use of his or her persona would probably result in that celebrity becoming "overexposed." Therefore, the overexposed celebrity's "selling price" is likely to be greatly reduced,³⁰ and his or her chances for obtaining high quality jobs are significantly impeded.

Even an individual who is not considered a "celebrity" should be afforded protection from overexposure by some third party. For example, consider an ordinary man walking by a burning building. He goes into the burning building and saves the lives of some people. If the public is allowed unrestricted use of the man's persona, the selling price for his story may be greatly reduced because of his overexposure. Even this "non-celebrity" should be able to control his public image since his exposure by some third party may substantially alter the value of his image.

B. Preventing the Unjust Enrichment of Those Who Usurp the Identity of Another

The economic rationale for the recognition of a right of publicity is to assure that the one who desires to use the identity of another purchases a license for its use.³¹ The rationale in favor of protecting a person's publicity right was best articulated by the United States Supreme Court: "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."³²

Even if the individual whose persona has been infringed has suffered no identifiable loss, the infringer has still been unjustly enriched and should not be permitted to retain any profit that he has unjustly received.³³ By allowing right of publicity claims to prevail and therefore making the infringer disgorge his profits, others will be deterred from attempting to use an individual's person without permission and compensation.³⁴

30. Hetherington, *supra* note 10, at 17.

31. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978).

32. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 526, 576 (1977) (quoting Harry Kalven, Jr., *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

33. MCCARTHY, *supra* note 8, § 11.8[D], at 11-48.1 to 11-50.

34. *Id.*

*C. Providing an Incentive to Creativity by Encouraging the
Production of Entertaining and Intellectual Works*

As the *Zacchini* court noted, the same consideration underlying the United States patent and copyright laws³⁵ should provide economic incentives to individuals to create performances of interest to the public.³⁶ The goal of patent laws is to bring new and improved products to the public,³⁷ thereby enhancing the wealth of society, by giving inventors an incentive to create new products. Similarly, the goal the courts should seek to promote in analyzing right of publicity cases is to bring new and more entertaining personas³⁸ to the public by giving individuals an incentive to create these personas.³⁹

Though the Constitution does explicitly provide protection of inventions under the patent laws,⁴⁰ it does not explicitly provide protection for an individual's right of publicity. This constitutional silence regarding the right of publicity may be due to the fact that, at the time the Constitution was written, there was not nearly the value associated with being prominent that there is today.⁴¹

35. United States Patent and Copyright laws spring from U.S. CONST. art. I, § 8, cl. 8: "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

36. The United States Supreme Court noted that:

[The] decision to protect [plaintiff's] right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.

Zacchini, 433 U.S. at 576.

37. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

38. "Because of a celebrity's audience appeal, people respond almost automatically to a celebrity's name or picture." *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349 (Ct. App. 1983).

39. See *Hetherington*, *supra* note 10, at 16 ("Were it not for the promise of the substantial rewards that come with celebrity status, many individuals would be reluctant to fight the long odds against achieving commercial success.").

40. See *supra* note 35 and accompanying text.

41. Even in 1960, one scholar commented that "[t]he innovators . . . could not have foreseen the advent of radio, television and motion pictures, and the concomitant scope and variety of commercial exploitations of names, likenesses and personalities of individuals." Harold R. Gordon, *Right of Publicity in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 554-55 (1960).

However, what about the "non-celebrity" who inadvertently achieves some level of prominence or notoriety? Consider the following situations: a scientist discovers a cure for some disease; a passerby heroically saves people from a burning building; or an ordinary person experiences an event that is of interest to the public. In these situations, economic incentive is not germane to the "non-celebrity's" right of publicity claim. Nevertheless, these "non-celebrities" do not lose their right because they are not motivated by economic gain; the courts need to look to other rationale for providing protection to the "non-celebrity."⁴²

III. FIRST AMENDMENT NEWSWORTHINESS DEFENSE

The First Amendment's policy of advancing the free flow of ideas, integral to robust public debate, is the stumbling block for most right of publicity claims.⁴³ There is an inherent conflict between the First Amendment and the right of publicity when an individual "commercially benefits from a constitutionally protected use of another's identity."⁴⁴ Often, this commercial benefit is the result of the unauthorized use of an individual's persona in advertising or merchandising. In such purely commercial settings, the courts will usually find that the individual's right of publicity claim outweighs the infringer's First Amendment rights.⁴⁵ Therefore, clear-cut infringement is not the focus of this article. The more problematic situation is where an artist/infringer uses, without permission, an individual's persona in a fiction-based work of art and profits from such use.

42. For a discussion of the other rationales, see discussion *supra*, parts II.A and II.B.

43. "The California Supreme Court has subjected the 'right of publicity' under California law to a narrowing interpretation which accords with First Amendment values. The Court has acknowledged that 'the right of publicity has not been held to outweigh the value of free expression.'" *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 638 (9th Cir. 1982) (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461-62 (Cal. 1979) (Bird, C.J., concurring)), *cert. denied*, 462 U.S. 1120 (1983); see also *Felcher & Rubin, supra* note 8, at 1577 n.2.

44. James Barr Haines, *First Amendment II: Developments in the Right of Publicity*, 1989 ANN. SURV. AM. L. 211 (1990).

45. See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (right of publicity successfully invoked to prevent an automobile company from using Bette Midler's distinctive style in its advertisements); *Haelen Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.) (right of publicity successfully invoked to protect professional baseball player's name and picture on chewing gum cards), *cert. denied*, 346 U.S. 816 (1953). See also *Felcher & Rubin, supra* note 8, at 1606 (arguing that, because commercial settings such as advertising and merchandising have almost no informative value and generally seek solely to exploit the individual for economic gain, such use normally falls outside any First Amendment protection).

In determining whether to allow the First Amendment privilege to prevail over a right of publicity claim, the courts will attempt to balance the artist's First Amendment rights against an individual's right to control the commercial use of his or her persona. This balancing of First Amendment rights entails evaluating whether the particular matter is of public interest, or sufficiently "newsworthy,"⁴⁶ to warrant exclusion from liability for the right of publicity claim.⁴⁷ When performing this balancing, most courts have found that the First Amendment newsworthiness defense outweighs a right of publicity claim.⁴⁸ However, the United States Supreme Court has held that the First Amendment privilege is not an absolute defense when an individual's right of publicity has been infringed.⁴⁹

The media's use of an individual's persona in the presentation of "news" is clearly constitutionally "immune from liability for infringement of the right of publicity."⁵⁰ Courts have held that an individual's right of publicity must yield to the First Amendment when the right conflicts "with the free dissemination of thoughts, ideas, newsworthy events and matters of public interest."⁵¹ It is this author's position that this statement is not applicable in all right of publicity cases. In situations involving fiction-based art, there may be a greater need to protect the individual whose persona has been usurped rather than the infringer.⁵²

46. The First Amendment privilege is coextensive with the meaning of newsworthiness.

47. MCCARTHY, *supra* note 8, § 8.8[B][2], at 8-45.

48. Haines, *supra* note 44, at 226 ("When confronted by such a conflict [First Amendment v. right of publicity], courts almost invariably subordinate the interests protected by the right of publicity to competing free speech interests."). A reason for this consistent trumping of right of publicity claims can be found in a statement made by the California Court of Appeal: "Publication of matters in the public interest, which rests on the right of the public to know, and the freedom . . . to tell it, cannot ordinarily be actionable." *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349 (Ct. App. 1983).

49. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The holding in this case may only apply when the plaintiff's *entire act* is used. See *supra* note 24 and accompanying text.

50. MCCARTHY, *supra* note 8, § 8.8[A], at 8-43.

51. *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (1968).

52. The Ninth Circuit, in dictum, stated: "The purpose of the media's use of a person's identity is central. If the purpose is 'informative or cultural' the use is immune; 'if it serves no such function but merely exploits the individual portrayed, immunity will not be granted.'" *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (quoting in part *Felcher & Rubin, Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596 (1979)).

Though a number of courts generally found the concept of newsworthiness expansive,⁵³ they have not agreed upon a definition of an acceptable test of newsworthiness in the right of publicity arena.⁵⁴ The United States Supreme Court,⁵⁵ the Ninth Circuit Court of Appeals,⁵⁶ and California state courts⁵⁷ either have not had the opportunity to define "newsworthiness" in right of publicity cases or have been presented with the opportunity but have failed to provide a workable test.

A. *The United States Supreme Court's Approach to Newsworthiness*

The United States Supreme Court first attempted to give guidance on what was a matter of "public interest" and hence deserving of First Amendment protection in *Time, Inc. v. Hill*.⁵⁸ Although this case is not concerned with the right of publicity, it does provide a definition of what is "newsworthy."⁵⁹ Unfortunately, the *Hill* definition is circular.⁶⁰ Defining what constitutes a "matter of public interest"⁶¹ by examination of what one would generally find in "any newspaper or magazine,"⁶² the Court allows the media itself to determine what constitutes a matter of public concern.⁶³ Unfortunately, this circular definition of "newsworthiness," and minimization of plaintiff's interests have become common in other courts as well.

53. MCCARTHY, *supra* note 8, § 8.8[B][2], at 8-46, 8-47 (citing *Welch v. Group W Prods., Inc.*, 525 N.Y.S.2d 466, 468 (1987)).

54. Haines, *supra* note 44, at 227 (arguing that numerous exceptions to the concept of newsworthiness have caused confusion in the analysis of newsworthiness and inconsistent decisions). *But see*, Joel S. Lind, *The Right of Publicity in New York: A Practical Analysis*, 7 ART & THE LAW 355, 371 (1983) (concluding that the state of New York law concerning the right of publicity as of 1983 was not illogical or inconsistent, and was no more confusing than any other new and developing body of law).

55. *See* discussion *infra*, part III.A.

56. *See* discussion *infra*, part III.B.

57. *See* discussion *infra*, part III.C.

58. 385 U.S. 374 (1967).

59. The *Time* case was decided by the United States Supreme Court in 1967, ten years before the *Zacchini* right of publicity case was decided. The *Zacchini* case is the one and only right of publicity case that has been brought before the United States Supreme Court. *See infra* notes 64-69 and accompanying text. The United States Supreme Court has only attempted to define what is "newsworthy" or of "public interest" in the *Time* case.

60. MCCARTHY, *supra* note 8, § 8.8[B][2], at 8-46.

61. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

62. *Id.*

63. MCCARTHY, *supra* note 8, § 8.8[B][2], at 8-46.

In the only United States Supreme Court case to deal with the right of publicity, *Zacchini v. Scripps-Howard Broadcasting Co.*,⁶⁴ the Court used a multi-factored analysis in determining that the plaintiff's right of publicity in his performance should be protected.⁶⁵ This approach eschewed the concept of premising liability on the mere absence of "newsworthiness." The factors considered by the Court were: (1) the threat the broadcast posed to the economic value of Zacchini's performance;⁶⁶ (2) the policy of preventing unjust enrichment to the broadcasting company by the taking of the goodwill Zacchini had created;⁶⁷ and (3) the necessity of providing incentives for performers to make the kind of investments required in order to produce performances of interest to the public.⁶⁸ Additionally, the Court noted that the public's interest in obtaining the information shown on television concerning the performance, the defendant's interest in presenting the performance, and the plaintiff's interest in profiting from the performance could all be accommodated because Zacchini did not seek to enjoin the broadcast, but to be re-compensated for the value of the broadcast.⁶⁹

In this well-reasoned approach, the Court accommodated the interests of all parties, provided incentives to individuals to create works of interest to the public, and avoided basing a determination of liability on a nebulous concept of "newsworthiness."⁷⁰ Unfortunately, other courts have not been as successful at performing this balancing, and instead have looked to "newsworthiness" as the touchstone of their analysis.

B. *The Ninth Circuit's Approach to Newsworthiness*

In the right of publicity decisions before the Ninth Circuit, the court has rarely been confronted with the necessity to discuss or define matters of "newsworthiness." The only discussion of newsworthiness by the Ninth Circuit has been in the case of *Virgil v. Time, Inc.*,⁷¹ which involved the public disclosure of embarrassing private facts.⁷² The court in *Virgil*

64. 433 U.S. 562 (1977).

65. See *supra* notes 19-22 and accompanying text.

66. *Zacchini*, 433 U.S. at 575-76; see discussion *supra*, part II.A.

67. *Zacchini*, 433 U.S. at 576; see discussion *supra*, part II.B.

68. *Zacchini*, 433 U.S. at 576-77; see discussion *supra*, part II.C.

69. *Zacchini*, 433 U.S. at 578.

70. The *Zacchini* case may be limited to its facts and therefore may only apply to situations where the plaintiff's entire act is infringed. See *supra* note 24 and accompanying text.

71. 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

72. *Id.*

adopted the Restatement (Second) of Torts standard for newsworthiness.⁷³ Therefore, since the Ninth Circuit has not been confronted with a right of publicity case which warranted a discussion of newsworthiness, it has not contributed to the development of a workable definition or test for newsworthiness in the right of publicity arena.

C. California's Approach to Newsworthiness

Although the California Supreme Court, in *Briscoe v. Reader's Digest Ass'n, Inc.*,⁷⁴ developed a well-accepted test for newsworthiness in the law of privacy, it has not been as successful in developing a workable test for newsworthiness in right of publicity cases. In *Briscoe*, the court reiterated the criteria for determining whether a work is newsworthy in a right of privacy context: "(1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to position of public notoriety."⁷⁵ In *Dora v. Frontline Video, Inc.*,⁷⁶ the California Court of Appeal had the opportunity to adopt the *Briscoe* test for newsworthiness in right of publicity cases, but properly declined to do so.⁷⁷ Neither *Dora* nor other California cases have delved into the differing policies in the law of privacy and right of publicity cases specifically with regards to newsworthiness.

However, it seems clear that at least the second criteria of the *Briscoe* test⁷⁸ is an inappropriate consideration in right of publicity cases. This privacy tort was developed to protect individuals from the embarrassing disclosure of private facts.⁷⁹ Therefore, under the law of privacy rubric, it is reasonable to consider the depth of intrusion into private affairs.

By contrast, the right of publicity tort was developed to protect an individual's property interest in his or her name or likeness and to

73. *Id.* at 1129-30 ("In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores."). *Id.* at 1129.

74. 483 P.2d 34 (Cal. 1971).

75. *Id.* at 43 (quoting *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969)).

76. 18 Cal. Rptr. 2d 790 (1993).

77. *Id.* at 793. Though the *Dora* court did not analyze the policy justifications for and against the adoption of the *Briscoe* test (or *Maheu* test as the court referred to it) in right of publicity cases, in dicta, it did apply the *Briscoe* test and found that even if the *Briscoe* test were applied in *Dora* the result would not provide grounds for reversal. *Id.*

78. "[D]epth of . . . intrusion into ostensibly private affairs." *Briscoe*, 483 P.2d at 43.

79. See MCCARTHY, *supra* note 8, § 8.7[C], at 8-40.

encourage development of well known persona.⁸⁰ The "depth of . . . intrusion into ostensibly private affairs"⁸¹ is not a concern in a right of publicity context. How far the infringer goes into an individual's private affairs to capture his or her persona is irrelevant; it is the fact that the persona is being commercially exploited by someone other than the owner of that persona. The right of publicity is not concerned with the harm or injury to the infringed party's feelings, as would be accommodated by the second prong in the *Briscoe* test, but rather is concerned with the harm to the infringed party's economic interest.⁸²

While *Dora* did not adopt the *Briscoe* test⁸³ for newsworthiness, it did mention the mantras, "public interest" and "social value,"⁸⁴ heard time and again in other right of publicity cases when evaluating newsworthiness. Giving enormous weight to First Amendment concerns while downplaying any property interest *Dora* had, the court stated: "Publication of matters in the public interest which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily actionable."⁸⁵ The court found that the subject of the documentary involved in *Dora*⁸⁶ was of "public interest," and it had "social value."⁸⁷ Therefore defendant's use of *Dora*'s image was protected under the First Amendment.⁸⁸

Just as *Dora* provides little insight into the meaning of newsworthiness in the right of publicity context, *Eastwood v. Superior Court*⁸⁹ avoided having to balance the newsworthiness of an allegedly false article against the plaintiff's interest. The *Eastwood* court did recognize that in right of publicity cases, the outcome would turn on a balancing of the plaintiff's private interest in his right of publicity against "matters of public

80. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) ("[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.").

81. *Briscoe*, 483 P.2d at 43.

82. *Dora*, 18 Cal. Rptr. 2d at 791-92.

83. See text *supra* accompanying note 77.

84. *Dora*, 18 Cal. Rptr. 2d at 792-94.

85. *Id.* at 792 (citing *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349 (Ct. App. 1983)).

86. The documentary is of the legendary Malibu surf culture. *Dora*, 18 Cal. Rptr. 2d at 791. Mickey Dora was a "sleek and powerful man who ruled Malibu through the 1960s [and] surfed for the 'Gidget' movies." David Wharton, *Hot And Bothered: The Pop-Idol Publicity Wave May Be The Toughest That Surfing King Kelly Slater Has Ever Ridden*, L.A. TIMES, Aug. 26, 1993, at E1. He was a "legendary figure in surfing" whose "exploits at Malibu . . . are the folklore of the sport." *Dora*, 18 Cal. Rptr. 2d at 791.

87. *Dora*, 118 Cal. Rptr. 2d at 793.

88. *Id.* at 793-94. In addition to his common law claim, *Dora* also brought a statutory claim for appropriation of name or likeness, which was also unsuccessful. *Id.* at 790, 795.

89. 198 Cal. Rptr. 342 (Ct. App. 1983).

interest calling for constitutional protection."⁹⁰ However, because Eastwood did not allege the proper degree of scienter,⁹¹ the court determined that his cause of action was insufficient, and avoided having to reach the balancing test.⁹²

From the California cases involving right of publicity, we learn little more than the fact that something newsworthy is a "matter of public interest."⁹³ Further, although that interest must be weighed against the plaintiff's economic interest,⁹⁴ we do not learn how much weight to give the competing interests.

IV. FACT-BASED ART DESERVES MORE PROTECTION THAN FICTION-BASED ART WHEN BALANCED AGAINST AN INDIVIDUAL'S RIGHT OF PUBLICITY

The California courts, depending on whether the art is fact-based or fiction-based, currently make inquiry into whether the matter is "of public interest" or sufficiently "newsworthy" to immunize it from liability when confronted with right of publicity claims.⁹⁵ The amount of protection accorded to factual works should not be as great as that given to works of art which are based on fiction because "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."⁹⁶

If one were to apply California's standard of "newsworthiness" when balancing a First Amendment protection of art against an individual's right of publicity, it is the position of this author that the protection of art would

90. *Id.* at 349.

91. Eastwood only alleged "calculated falsehood" and the court found that "knowledge or reckless disregard of falsity" was required. *Id.* at 352.

92. *Id.*

93. *See supra* notes 84-90 and accompanying text.

94. *Eastwood*, 198 Cal. Rptr. at 352.

95. *See* discussion *supra*, part III.B.

96. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985). *But see*, *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301 (1965), where the court, although discussing the protection of books versus motion pictures, is implying that these entertaining works are deserving of the same level of protection as factual works:

Motion pictures, as well as books, are "a significant medium for the communication of ideas;" their importance "as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform;" and like books, they are a constitutionally protected form of expression notwithstanding that "their production, distribution, and exhibition is a large-scale business conducted for private profit."

Id. at 306.

almost always prevail. The test used by the courts when determining whether a particular matter is "newsworthy" is whether the matter is of "public interest"⁹⁷ or has "social value."⁹⁸ But, to some individuals, almost every piece of art has some social value, though that value might be exceedingly small.

This section of the article addresses why all works of art should not be treated the same. Fiction-based works of art need to be evaluated differently than fact-based works of art in light of an individual's right of publicity. By providing less First Amendment protection to art based on fiction for those who infringe upon an individual's persona, we should see a trend develop whereby successful right of publicity claims become the majority. Establishing this lower level of protection for the infringer also better supports the infringed's right to control his or her commercial value to which he or she is entitled, and for which the right of publicity was designed to protect.

Section IV.A discusses the value of fiction-based works of art and fact-based works of art with respect to a First Amendment versus Right of Publicity analysis. Section IV.B confronts the problem of applying the current "newsworthiness" analysis to art based on fiction. Section IV.C provides five factors that need to be considered by the courts when confronted with a right of publicity-fiction-based art case.

A. *The Value of Fiction-Based Art Works and Fact-Based Art Works*

The value to society of fiction-based art and fact-based art is generally not the same. Therefore, fiction-based art and fact-based art should not be afforded the same weight in the right of publicity context. Factual works of art such as an historical montage with a photograph of an individual at a protest rally may deserve the greatest amount of First Amendment protection because it has socio-political importance. On the other hand, a fiction-based work of art such as a painting of an individual in some compromising situation conveys "little in the way of provocation of thought, . . . [has] scant relationship to the marketplace of ideas and minimal bearing on the conduct of the polity."⁹⁹ Thus, in this example, the fiction-based art is merely exploitive in nature and deserves little, if

97. See *supra* notes 87 and 61-63 and accompanying text.

98. See *supra* note 87 and accompanying text.

99. Marshall S. Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 TEX. L. REV. 650, 659 (1968).

any, First Amendment protection against the individual's right of publicity. Since the public's interest in dissemination of these works of art does not weigh more heavily than the right of publicity of the individual upon whom the work is based, the individual should be given more protection in the uses to which his persona is put than the artist who uses that persona, or the public that seeks the unauthorized exploitation of the persona.

Professor Nimmer made a similar point in the copyright context. Professor Nimmer noted that oftentimes graphic works cannot be adequately described in words or other non-infringing forms of expression.¹⁰⁰ However, just because these graphic works may in some way contribute to the discussion of ideas in society does not mean that courts should allow others to violate the creator's copyright in the work.¹⁰¹ Because these graphic works do not, relatively speaking, contribute greatly to political discourse, the interest most highly protected by the First Amendment, the copyright holder's interest in these works is greater than the public's interest in the unauthorized dissemination of these works.¹⁰²

Nimmer aptly contrasted graphic art works with what may be considered an almost purely factual work — news photographs.¹⁰³ Noting that photographs of the My Lai massacre in Vietnam gave the public a unique understanding of that event, those "expressions" of the "idea" of the My Lai massacre became essential to the public's understanding of the event.¹⁰⁴ Because the news photographs were essentially factual works, the copyright holder's interest in the photographs did not outweigh the public's interest in the dissemination of those photographs.¹⁰⁵

Nimmer also commented to the same effect regarding *Time, Inc. v. Bernard Geis Associates*.¹⁰⁶ In *Time*, Time Magazine bought a home movie capturing the assassination of John F. Kennedy and held the copyright on the movie.¹⁰⁷ Subsequently, an author included sketches depicting frames of the movie in a book about the Kennedy assassination.¹⁰⁸ Though the case was not decided on First Amendment principles, Nimmer commented that First Amendment free speech interests

100. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10[C][2] (1993).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. NIMMER & NIMMER, *supra* note 100, at § 1.10[C][2]d.

106. 293 F. Supp. 130 (S.D.N.Y. 1968).

107. *Id.* at 131.

108. *Id.* at 132.

outweighed the copyright holder's interest in control of dissemination of the work.¹⁰⁹

*B. California's Newsworthiness Analysis Is Not Adequate
When Confronted With Fiction-Based Art*

The application of the California standard of newsworthiness¹¹⁰ gives great weight to the infringer because it assumes that the work of art is of great interest and benefit to the public. But fictional works of art are not always of as much value as factual works. Perhaps the protection afforded all works of art, whether fact-based or fiction-based, is due, in part, to the fact that the courts do not want to determine whether a particular work of art has "socio-political" value and is informative, or is merely exploiting an individual for economic gain.

Although art is very important to our culture, its importance to the public should not always outweigh an individual's right to control the commercial use of his own persona. Because the courts currently do not seem to make the distinction between fiction-based art and fact-based art, an individual's common law right of publicity fails much more frequently than it should. The courts need to look beyond the question of whether the particular matter is of "public interest" when confronted with a matter of fiction-based art.¹¹¹

*C. Factors Other Than "Newsworthiness"
Need to Be Considered*

While the author's position is clear that fiction-based art generally deserves less First Amendment protection than works based on fact,¹¹² the question arises, under what circumstances does the interest of the individual outweigh the interests in dissemination of the art work. Commentators have often discussed an analogous conflict — the inherent conflict between First Amendment rights on one hand, and the rights of those who publish in controlling dissemination of their works on the other.¹¹³

109. NIMMER & NIMMER, *supra* note 100.

110. See discussion *supra*, part III.C.

111. "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 792 (Ct. App. 1993) (citing *Carlisle v. Fawcett Publications, Inc.*, 20 Cal. Rptr. 405, 414 (Ct. App. 1962)).

112. See discussion *supra*, part IV.A.

113. NIMMER & NIMMER, *supra* note 100, at § 1.10[A] ("[T]he views of copyright and the First Amendment, held 'side by side,' may, in fact, be contradictory."); WILLIAM F. PATRY, *THE*

Not surprisingly, copyright law presents an analogous analytical framework with which to examine this issue. This framework is the fair use doctrine.¹¹⁴ Under the fair use doctrine, four factors are considered when determining whether an infringer's use of a copyrighted work is "fair."¹¹⁵ These factors are:

- (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.¹¹⁶

While similarities between the right of publicity and copyright exist, the analogy is not perfect. It breaks down when considering the nature of a copyrighted work and the nature of the right of publicity. To be copyrightable, a work must be "fixed in a tangible medium of expression."¹¹⁷ Therefore, copyright infringement generally occurs when a party uses or sells a work or part of a work already created or published. For example, taking extensive verbatim excerpts from a manuscript authored by Gerald Ford and using those excerpts in another publication was copyright infringement.¹¹⁸ In right of publicity cases, however, the infringer creates or publishes a completely new work,¹¹⁹ though based on another's persona.

FAIR USE PRIVILEGE IN COPYRIGHT LAW 462 (1985) (pointing out that some have viewed copyright as a "stepchild of censorship" continually in tension with the First Amendment).

114. Fair use is codified in the Copyright Act, 35 U.S.C. § 107.

115. 35 U.S.C. § 107.

116. *Id.*

117. 17 U.S.C. § 102(a). The tangible fixation requirement does not apply to the right of publicity as it does in copyright. Consider a copyrighted book. The book is comprised of numerous pages with words written on them, tangibly fixed. The words and pages are not evanescent, whereas unrecorded spoken words are evanescent. By contrast, a celebrity persona often changes dramatically over time and can be considered as evanescent as spoken words. For a timely and striking example of the change in a celebrity persona, consider popular music star Michael Jackson. Prior to the 1993 allegations of Jackson's child molestation he was a highly marketable music superstar. Since the molestation allegations, long-time sponsors such as Pepsi Cola have dropped Jackson as a celebrity endorser and his public image has been tainted, at least for the moment. See *Pepsi Drops Michael Jackson*, N.Y. TIMES, Nov. 15, 1993, at D1.

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

119. For example, a painting or story that makes use of a celebrity persona.

For example, consider *Ali v. Playgirl, Inc.*¹²⁰ In *Ali*, Playgirl magazine, the alleged right of publicity infringer, published a painting of a nude boxer bearing a striking resemblance to Muhammad Ali.¹²¹ Though the painting was a new work, never before published, it was based on Ali's image. To a lesser extent, the same was true in *Zacchini* where Zacchini's performance, at least for the day in question, had never been published.¹²²

Unlike a copyrightable work, a persona is not fixed in a tangible medium.¹²³ This difference between right of publicity and copyright gives rise to the need to use a somewhat different analysis than fair use and, additionally, consider two factors not statutorily required under the fair use analysis. The most analogous fair use factors applicable to the right of publicity are: (a) purpose and character of the use; and (b) amount and substantiality of the portion used.¹²⁴ Additionally, a policy consideration for both copyright and the right of the publicity is the effect on the incentive for the creator to create valuable works. The applicable factors not considered in fair use are the economic interests of the infringer and the marketability of the infringed's persona. Therefore, the following factors should be considered when balancing an infringed's right of publicity against an infringer's right to use the infringed's persona in his or her fictional work of art: (1) the nature of the work;¹²⁵ (2) the extent of the use of the infringed;¹²⁶ (3) the effect on the infringed's incentive to create a valuable persona;¹²⁷ (4) the marketability of the infringed's persona;¹²⁸ and (5) the economic interests of the infringer.¹²⁹

1. Nature of the Work

Under the fair use doctrine, if the "purpose and character" of the use of a copyrighted work, or the "nature" of the use of a work is educational

120. 447 F. Supp. 723 (S.D.N.Y. 1978).

121. *Id.* at 726-27.

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

123. Similarly, just as a persona is not copyrightable because it is not fixed, a "voice" is not copyrightable because sounds are not fixed. *Midler v. Ford Motor Company*, 849 F.2d 460, 462 (9th Cir. 1988) (Bette Midler's voice found not copyrightable because sounds are not fixed).

124. 35 U.S.C. § 107.

125. *See discussion infra*, part IV.C.1.

126. *See discussion infra*, part IV.C.2.

127. *See discussion infra*, part IV.C.3.

128. *See discussion infra*, part IV.C.4.

129. *See discussion infra*, part IV.C.5.

rather than commercial, it is more likely to be found a "fair" use.¹³⁰ Since an art work based on fact is more likely than a work based on fantasy¹³¹ to depict useful information about an actual event, there is a greater likelihood that the fact based work will educate more than will the fantasy based work. Therefore, application of a fair use type of standard in the right of publicity arena would provide greater protection to fact based works that appropriate a persona than to fantasy based works.

The only case found that adopted the fair use standards in the right of publicity context and considered the "nature of the work" is *Apple Corps Ltd. v. Leber*.¹³² Though the court in *Apple* explicitly adopted the fair-use standards, it did not explicitly provide any details as to how the fair-use factors apply in the right of publicity context.¹³³ The court did, however, touch upon two of the factors when analogizing to *Zacchini*. These factors were: (a) purpose and character of the use; and (b) amount and substantiality of the portion used.¹³⁴

In *Apple*, the plaintiffs brought a claim based on the right of publicity against the producers of *Beatlemania*, a live performance of Beatles songs by musicians who looked and sounded like the Beatles.¹³⁵ Analogizing to *Zacchini*, the *Apple* court found that the primary purpose of *Beatlemania* was to commercially exploit the goodwill and popularity of the Beatles' persona.¹³⁶ This factor is clearly analogous to the "purpose and character of the use" factor under the fair use analysis.

Other fair use cases, not involving the right of publicity, have also focused on the commercial nature of the defendant's use to determine

130. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 (1984) ("Although not conclusive, the first factor requires that 'the commercial or nonprofit character of an activity' be weighed in any fair use decision.").

131. A work of fantasy is intended to be synonymous with the author's terminology of fiction-based art.

132. 12 Media L. Rep. 2280 (Cal. Sup. Ct. 1986).

133. *Id.* at 2282. The court summarily found that "defendants' appropriation greatly exceeded any fair use. Without going into unnecessary detail [actually any detail at all] in this memorandum, it appears by all tests, the scale tips in favor of plaintiff." *Id.*

134. *Id.*

135. *Id.* at 2281.

136. *Id.* at 2282.

whether the use was fair.¹³⁷ In these cases the most significant factor is the usefulness of the information provided to the public.

In the fiction-based art context, defendants might always claim that their art works impart some useful information to the public. However, just as the defendants in *Apple* claimed that *Beatlemania* "contained significant political and social comment,"¹³⁸ merely claiming that the work imparts useful information is not enough. The reason why fiction-based art should survive a right of publicity attack less frequently than fact-based works, such as news photographs,¹³⁹ is that art based on fiction is much less likely to impart useful information. The art work is typically based on the artist's imagination. When the art work is not a true to life depiction of an actual event that is important for the public to understand, the art work should be given a lesser level of protection.¹⁴⁰

2. Extent of the Use of the Infringed

A second fair use factor applicable to right of publicity cases is the "amount and substantiality of the portion used,"¹⁴¹ or, in right of publicity terms, the extent of the use of the individual's persona. Just as the court in *Apple* demonstrated the applicability of the fair use factor "purpose and character of the work" to a right of publicity case, so did it apply the extent of the use factor.¹⁴²

137. In *Consumers Union of United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984), the court allowed a use of excerpts of a review of a product written for *Consumer Reports* magazine in an advertisement for the product. The court made a very instructive point when analyzing the "character" of the use, i.e., whether the use is commercial or not. Though "[a]lmost all newspapers, books and magazines are published by commercial enterprises that seek a profit," presence or absence of a profit seeking motive is not dispositive. *Id.* at 1049. Rather the key is whether the use conveys "useful information" to the public. *Id.*

Similarly, in *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979), the court allowed private home video taping of free broadcasts because the taping provided "the fullest possible access to information through the public airwaves." *Id.* at 454 (citing *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

138. *Apple*, 12 Media L. Rep. at 2281.

139. See *supra* notes 103-105 and accompanying text.

140. By way of contrast, in *Time*, the art work, sketches of film frames showing the assassination of John F. Kennedy, was found to be a true to life depiction of an actual event in which the public had a very strong interest in receiving the fullest possible information. See discussion *supra* notes 107-109 and accompanying text.

141. 35 U.S.C. § 107.

142. See *supra* note 134 and accompanying text.

In *Apple*, the court found that the defendants' use of the Beatles' persona amounted to a complete misappropriation.¹⁴³ Though the court did not couch this analysis in terms of fair use, this factor is clearly analogous to the "amount and substantiality of the portion used" fair use factor. Under the fair use analysis, an infringing work that is based completely on a copyrighted work is generally considered not to be a fair use.¹⁴⁴ In *Beatlemania*, the performance was based almost entirely on the songs and appearance of the Beatles.¹⁴⁵ The court found that viewers of the *Beatlemania* performance might "suspend their disbelief and [fall] prey to the illusion that they were actually viewing the Beatles in performance."¹⁴⁶ Because the taking was so substantial, it was not a fair use.¹⁴⁷

Cases outside the right of publicity realm also find that a taking based completely on another work will not be considered a fair use.¹⁴⁸ However, the quantity of the taking is not the only measure to be used when considering the extent of the taking. One must also look to the "value" of the material appropriated.¹⁴⁹

A fiction-based art work that is centered completely around the infringed's persona that does not make some mitigating "creative comment"¹⁵⁰ should not be allowed.¹⁵¹ Similarly, neither should an art work that may only partly consist of the appropriation of a persona be allowed if the marketability of the art work is based on the appropriation. Because it is the "value" of the material taken that might allow the infringer to profit, the use should not be allowed.¹⁵²

143. *Apple*, 12 Media L. Rep. at 2282.

144. *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d. Cir.), *cert. denied*, 484 U.S. 890 (1987) ("[W]hat is relevant is the amount and substantiality of the copyrighted expression that has been used. . .").

145. *Apple*, 12 Media L. Rep. at 2281.

146. *Id.* at 2282.

147. *Id.* Similarly, in *Groucho Marx Prod. v. Day And Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982), the district court found that a "wholesale appropriation of the Marx Brothers characters" substantially overshadowed the intent to criticize or parody, and was not permissible. *Id.* at 493.

148. See *supra* note 144 and accompanying text.

149. PATRY, *supra* note 113, at 452.

150. *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1358 n.18 (D. N.J. 1981).

151. For example, consider the painting of Muhammad Ali in *Ali*. If the entire painting consists solely of Ali, the infringer should not be allowed to profit from that painting.

152. Continuing with the Ali example, consider a painting that has many elements in it, maybe lions, tigers, elephants, monkeys, and Ali in a corner sitting on a throne implying that Ali is king of the jungle of boxers. If the entire appeal of the work came from the use of Ali's image, the infringer should not be allowed to profit from the work. Even though the depiction of Ali is only a small portion of the work, Ali's image gives the work its value.

3. Effect on the Infringed's Incentive to Create a Valuable Persona

The dramatic rise in value associated with fame did not occur until the first half of the twentieth century when the "star system" first developed.¹⁵³ Today, the profits that can be made capitalizing on famous personas are tremendous.¹⁵⁴ Without incentives to create these personas that the public seems so desirous of, as manifested by the amount the public is willing to spend, it is quite possible that the entertaining and intellectual works created by the individuals who stand to profit would be greatly diminished. While the Federal Constitution may not provide explicit protection for these personas, the courts should provide strong common law protection for them.

Analogizing to the rationale behind the protection provided by patent and copyright law, an individual should have a greater right to control the use of his persona in a work of fiction than a work of fact. In patent and copyright law, pure ideas are not protected.¹⁵⁵ Only the applications of ideas are protected.¹⁵⁶

A work of fact which mentions a persona is analogous to a pure idea. A pure idea describes some real life event or basic truth of nature.¹⁵⁷

153. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 128 (1993). Similarly, as discussed supra in Part II.C, the "incentive" factor is not necessarily germane to a right of publicity cause of action for a "non-celebrity." Depending upon the particular circumstances surrounding the individual whose persona was infringed, this factor may not be at issue.

154. For example, annual revenues from "music merchandising" alone are estimated to be over half a billion dollars. *Id.* at 129, n.10.

155. See *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) ("[P]henomena of nature, . . . mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work."); JOHN E. NOWACK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.36, at 1055 (4th ed. 1991) ("Copyright law . . . protects only the form of the expression, not the facts or ideas expressed." (citing *New York Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring); *International News Service v. Associated Press*, 248 U.S. 215, 234 (1918))). See also PETER D. ROSENBERG, *PATENT LAW FUNDAMENTALS* § 1.03, at 1-14 (2d ed. 1994) ("A fundamental principle common to all genres of intellectual property is that they do not carry any exclusive right in mere abstract ideas. Rather, their exclusivity touches only the concrete, tangible, or physical embodiment of an abstraction.").

156. ROSENBERG, *supra* note 155, §1.04, at 1-20 to 1-21 ("[O]nly inventions are patentable — naked discoveries are not!" (citing *In re Kemper*, 14 Fed. Cas. 286 (No. 7,687) (C.C.D.C. 1841))).

157. See, e.g., *Mackay Radio & Tel. Co., Inc. v. Radio Corp. of Am.*, 306 U.S. 86, 94 (1939); Victor de Gyrafas, *Software as Patentable Subject Matter: A Comparison of International Approaches*, 18 NEW MATTER No. 3, at 7, 8 (An example of a pure idea is Einstein's famous equation describing the mathematical relationship between mass and energy, $E=mc^2$).

Similarly, a factual report that includes mention of a persona describes a real life event. Therefore, an individual's right to control the mention of his persona in a factual work should be severely limited, just as the ability to monopolize an idea is severely limited. The value to the public is too great to allow that kind of monopolization.

However, a work of fiction which includes a persona is analogous to an application of an idea. An artist who takes a persona created by another for use in his fictional work of art is like a copyright or patent infringer who has taken the creation of another and used it without permission. Just as a copyright or patent holder has powerful remedies against infringers, so should the "persona holder" have powerful remedies against infringers in the realm of art works. If the persona holder does not have these remedies, his incentive to create may be severely diminished by fearless infringers.

4. Marketability of the Infringed's Persona

In the copyright context, the act of copying an already created or published work often does not diminish the demand for future works by the infringed. For example, if an infringer were to copy and sell a John Grisham novel less expensively than the original publisher, it is unlikely that the demand for future novels by John Grisham would be diminished in any way. As evidenced by Grisham's success with several novels, the public keeps hungering for new stories by Grisham. Therefore, under copyright, the future marketability of the infringed work is not considered.

However, in the right of publicity context, the infringer's use of an infringed's persona may be a significant factor leading to the dreaded "overexposure" of that individual, causing a decline in the public's desire for information about the individual. This decline in public interest has a corresponding detrimental effect on the ability of the celebrity to sell his persona or the ability to leverage himself into highly desirable positions, such as high paying company jobs or lead roles in important films.

5. Economic Interests of the Infringer

Because the infringer is creating something that had not existed before, presumably there is some contribution to society that should be valued. However, in valuing this contribution, consideration should be given to the motives, or economic interest of the infringer or creator. If the infringer created something that contributed useful facts to society or contributed to political discourse, then the infringer or creator's use of the

persona may be allowed.¹⁵⁸ If instead the infringer or creator's motives were premised primarily upon creating a personal economic gain, as the author has argued is the case with many fiction-based art works, then the infringer/creator's use should not be allowed.¹⁵⁹

When evaluating whether a person in the realm of gathering and disseminating facts has been unjustly enriched by use of an individual's persona, courts consider the enrichment to the public versus the degree of deprivation of the individual of his persona. Since the dissemination of factual information is of great social importance, the scales tend to tip in favor of the infringer, even though the infringer has been unjustly enriched.

There is no great social value in allowing an artist, whose primary purpose is to make a living, to disseminate his art and capitalize on another person's identity.¹⁶⁰ Further, there exists a great likelihood that an artist will exploit a prominent person's persona for purely financial benefit. Therefore, the scales of protection should tip in favor of the individual whose identity has been exploited for financial gain by another. This type of policy is necessary to keep the incentive for individuals to produce entertaining personas.

V. APPLICATION TO CASES

This section applies the multi-factored analysis of Part IV to right of publicity cases involving the infringement of an individual's persona in a fiction-based art context. This new approach would permit the courts to avoid having to use the current First Amendment analysis for all right of publicity cases, in consonance with courts' desires to avoid deciding a case on constitutional grounds if independent grounds for the decision exist.¹⁶¹

The two cases used in this section are not California cases, since California fails to provide the range of differing fact scenarios necessary to adequately demonstrate application of the multi-factored analysis. The first case involves the use of a famous mystery writer's name and identity in a fictionalized book and motion picture that concerns the mystery writer.¹⁶² This case is used to illustrate a scenario in which the analysis would favor

158. See discussion *supra*, part IV.A.

159. See discussion *supra*, part IV.A.

160. See *supra* note 32 and accompanying text.

161. James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 805 (1993) (The United States Supreme Court recognizes a doctrine whereby "a court should avoid addressing a constitutional issue if a case can be decided on any other grounds.").

162. See discussion *infra*, part V.A.

the plaintiff's right of publicity over the defendant's rights. The second case involves the use of an Archbishop's name in a novel and demonstrates a fact pattern in which the plaintiff's right of publicity does not triumph.¹⁶³

A. Application to *Hicks v. Casablanca Records*¹⁶⁴

The outcome of *Hicks v. Casablanca Records* would have been different had the court used the author's five factors in analyzing whether Agatha Christie's right of publicity claim should succeed. Although there is no common law descendibility for right of publicity claims in California,¹⁶⁵ the *Hicks* case provides a very interesting set of facts for application of the analysis.

In *Hicks*, Agatha Christie's name and identity were used undisputedly, without consent, in the defendants' book and motion picture.¹⁶⁶ The book and movie are based on the eleven day disappearance of Mrs. Christie in 1926.¹⁶⁷ The whereabouts of Mrs. Christie were as much of a mystery then as they are today.¹⁶⁸ The defendants provided a fictionalized account of Mrs. Christie's disappearance.¹⁶⁹ The court ruled against the right of publicity claim brought by the heir and assignees of Mrs. Christie, finding that "the right of publicity does not attach here, where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and . . . it is evident to the public that the events so depicted are fictitious."¹⁷⁰

First, the nature of the defendants' work is clearly non-educational.¹⁷¹ There is little likelihood that the book and movie actually

163. See discussion *infra*, part V.B.

164. 464 F. Supp. 426 (S.D.N.Y. 1978).

165. The California Supreme Court stated:

There has . . . been a good deal of consistency in the rules that have been applied to the four disparate torts under the common name. As to any of the four, it is agreed that the plaintiff's right is a personal one, which does not extend to members of his family, unless, as is obviously possible, their own privacy is invaded along with his. The right is not assignable, and while the cause of action may or may not survive after his death, . . . there is no common law right of action for a publication concerning one who is already dead.

Lugosi v. Universal Pictures, 603 P.2d 425, 429 (Cal. 1979) (citing DEAN PROSSER, LAW OF TORTS 814-15 (4th ed. 1971)).

166. See *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 433.

171. See discussion *supra*, part IV.C.1.

educated anybody about Mrs. Christie's life during her eleven day disappearance. At best, "the public will have a fictionalized account of this disappearance as set forth in the movie and in the book."¹⁷²

Second, the extent of the use of Mrs. Christie's persona was quite substantial.¹⁷³ Defendants appropriated both Mrs. Christie's name¹⁷⁴ and identity¹⁷⁵ and did not dispute the fact that Mrs. Christie and her disappearance were the primary focus of both the book and movie.¹⁷⁶

Third, since Agatha Christie is deceased, there was no effect on her incentive to create a valuable persona.¹⁷⁷ However, for the purposes of argument, the analysis will proceed as though Mrs. Christie were still alive. Here, Mrs. Christie's persona was used in a work of fiction and, thus, was like an application of an "idea" (her persona) that Mrs. Christie should have the right to control. Taking away Mrs. Christie's ability to control the application of her persona could lessen Mrs. Christie's incentive to further develop her persona.

In the right of publicity context, public policy dictates that it is important to promote the continued creation of entertaining and intellectual works.¹⁷⁸ The individual's economic incentive to make money is not the primary focus here. However, in order for society to advance the creation of entertaining and intellectual works, there needs to be some financial benefit to those who create the works. Therefore, if others were allowed to take Mrs. Christie's persona without paying, she might well decide that there would be little reason for her to keep developing her persona, thus depriving the public of her works.

Fourth, it is without question that Mrs. Christie was a marketable figure.¹⁷⁹ Mrs. Christie developed her persona "in such a way as to make it almost synonymous with mystery novels."¹⁸⁰ The use of her name in motion pictures and plays based on her works¹⁸¹ was highly marketable,

172. *Hicks*, 464 F. Supp. at 429.

173. See discussion *supra*, part IV.C.2.

174. The movie and book are both entitled "Agatha," thus making use of Mrs. Christie's first name. *Hicks*, 464 F. Supp. at 429. The body of both the movie and the book make use of Mrs. Christie's last name. *Id.* at 431.

175. The identity of Mrs. Christie as a mystery writer was also appropriated. *Hicks*, 464 F. Supp. at 429.

176. *Id.*

177. See discussion *supra*, part IV.C.3.

178. See discussion *supra*, part II.C.

179. See discussion *supra*, part IV.C.4.

180. *Hicks*, 464 F. Supp. at 428.

181. *Id.* at 430.

and she herself had exploited that market during promotions of her own works.¹⁸²

Finally, although the economic interests of the infringer¹⁸³ are not always clear, it can be inferred from the facts of *Hicks* that the defendants had a strong economic motive for using Mrs. Christie's name and identity. It is undisputed that both the book and movie concerned Mrs. Christie,¹⁸⁴ and that the public has a great interest in reading her books and enjoying works about her. If the defendants had chosen a different character, e.g. Samantha Sleuth, the public might not have been as interested in reading the book or viewing the movie. Arguably, at least Agatha Christie fans might not have been as interested. This evinces the defendants' desire to capitalize off Mrs. Christie and her eleven day disappearance. Therefore, it becomes clear that the defendants' motive in using Mrs. Christie's name and identity was for the purpose of achieving higher sales of their novel and movie tickets than would have been realized if Mrs. Christie's identity were not used.

In conclusion, it is clear that applying these five factors to the facts of *Hicks* would lead to a successful common law right of publicity cause of action.

B. Application to *Marcinkus v. NAL Publishing*¹⁸⁵

By way of contrast to *Hicks*, application of this multi-factored analysis does not always create a favorable result for the plaintiff. In *Marcinkus v. NAL Publishing*, for example, the plaintiff's interests would not have been significant enough to prevail. In *Marcinkus*, a Vatican official, Archbishop Marcinkus, sued for an injunction restraining defendant publishers from using the plaintiff's name in connection with publication of a novel.¹⁸⁶ In the novel, the character named Marcinkus plotted to kill then Soviet Premier Yuri Andropov.¹⁸⁷ In real life, Marcinkus had attained some notoriety when, as head of the Vatican Bank, he was implicated in the collapse of Banco Ambrosiano.¹⁸⁸

Though, on balance, the author's five factors weigh against Marcinkus, the first factor, the "nature of the work," weighs in Marcinkus' favor.

182. *Id.* at 429.

183. See discussion *supra*, part IV.C.5.

184. *Hicks*, 464 F. Supp. at 429.

185. 522 N.Y.S.2d 1009 (Sup. Ct. 1987).

186. *Marcinkus v. NAL Publishing*, 522 N.Y.S.2d 1009, 1009 (Sup. Ct. 1987).

187. *Id.* at 1010.

188. *Id.* at 1009-10.

The art work here was a novel that did not depict any true life event. In fact, the novel had a disclaimer stating that the actions of the characters named after real people were "entirely fictitious and should not be considered real or factual."¹⁸⁹ Thus there was no educational value about a real life event in the work.¹⁹⁰

The second factor, however, "extent of the use of the celebrity,"¹⁹¹ does weigh against the plaintiff. In *Marcinkus*, the defendant used Marcinkus' name and position in the novel. However, Marcinkus' persona was not central to the novel. In fact, in the United Kingdom release of the book, Marcinkus' name was replaced with another name.¹⁹² In contrast to *Hicks*, where Agatha Christie's persona was central to the work of art, Marcinkus' persona was not. The novel was based largely on fictional events — e.g., the conspiracy to assassinate a foreign leader — which were completely unconnected with Marcinkus' persona.¹⁹³ Thus, the extent of the use of Marcinkus' persona was minor.

Perhaps the factor that weighs most strongly against the plaintiff in *Marcinkus* is the third factor, "effect on the celebrity's incentive to create a valuable persona."¹⁹⁴ Marcinkus, an Archbishop, was presumably not driven by the same motivating factors that drive typical entertainment industry plaintiffs. As a man who dedicated his life to religious pursuits, Marcinkus did not seek out fame and notoriety the way an actor or an author would. That is, Marcinkus probably did not put a great deal of energy into creating a well known persona for the primary purpose of creating public recognition of that persona, as a famous actor would. Correspondingly, the effect of the defendants' novel on Marcinkus' incentive to create a persona valuable to the public was minimal. Marcinkus himself was probably never driven to profit from his notoriety. Therefore, Marcinkus probably would not have been less motivated to rise through the religious ranks had he known that someone might profit from his notoriety. This same type of analysis could well apply to a public servant/public office holder who was primarily driven by the desire to serve the public.

Further, the fourth factor, "marketability of the infringed,"¹⁹⁵ also weighs against Marcinkus. Here there was no evidence, and it seems

189. *Id.* at 1013.

190. See discussion *supra*, part IV.C.1.

191. See discussion *supra*, part IV.C.2.

192. *Marcinkus*, 522 N.Y.S.2d at 1010.

193. *Id.*

194. See discussion *supra*, part IV.C.3.

195. See discussion *supra*, part IV.C.4.

unlikely, that Marcinkus had used his persona to market other works of art or other goods. Nor did the court find that Marcinkus faced any risk of "overexposure" or that his future attempts to market his persona would be impaired by the novel.

Finally, even though the fifth factor, "economic interests of the infringer,"¹⁹⁶ weighs in the plaintiff's favor, the overall balance still favors the defendant. In *Marcinkus*, the court framed the issue as "whether the appropriation of plaintiff's name 'was primarily for trade or advertising purposes'"¹⁹⁷ Though the court did not seem to provide a clear answer to this issue, the court did find that, from the record, it could not be concluded that the defendants did not use the plaintiff's name for trade or advertising.¹⁹⁸ Therefore, because the defendants did use the plaintiff's name for advertising, the defendants' interests in creating an economic gain to themselves is clear.

On balance, Marcinkus' interests are not significant enough for him to prevail in his right of publicity cause of action. There was no proof of any effect on Marcinkus' incentive to further develop his persona; there was relatively minor use of Marcinkus' persona; and there was a lack of marketability of Marcinkus.

VI. CONCLUSION

California courts currently do not distinguish between art based on fact and art based on fiction in the right of publicity context. The courts currently undertake an analysis of "newsworthiness" under the First Amendment to determine whether the use of an individual's persona should be allowed in an art work. However, the value to society of fiction-based art and the value to society of fact-based art is generally not the same. Therefore, fiction-based art should be analyzed differently than fact-based art in the right of publicity context.

Rather than applying First Amendment principles to art works based on fiction, courts should employ a multi-factored analysis considering: (1) the nature of the work; (2) the extent of the use of the infringed; (3) the effect on the individual's incentive to create a valuable persona; (4) the marketability of the infringed; and (5) the economic interests of the infringer. By using this multi-factored analysis, the right of publicity will provide broader protection to the individual whose persona has been

196. See discussion *supra*, part IV.C.5.

197. *Marcinkus*, 522 N.Y.S.2d at 1011 (citations omitted).

198. *Id.* at 1014.

infringed. The purpose for the right of publicity as a separate cause of action would be furthered by the use of this multi-factored analysis since it better protects the economic value of an individual's identity, prevents unjust enrichment to the infringer of an individual's identity, and provides incentives to individuals to create entertaining or intellectual works.

