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A COMPARATIVE ANALYSIS OF CALIFORNIA'S RIGHT OF PUBLICITY AND THE UNITED KINGDOM'S APPROACH TO THE PROTECTION OF CELEBRITIES: WHERE ARE THEY BETTER PROTECTED?

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I. INTRODUCTION

For almost a century, society has grown increasingly obsessed with celebrities and what they portray. Celebrities are idolized for attaining a status very few can attain. Society's treatment of celebrities signals to the world that somehow these individuals are fundamentally different. Celebrity work entails acting, playing sports, and often posing for the camera. Celebrities live glamorously, arrive on red carpets, and attend exclusive events. Celebrities receive generous if not outlandish salaries. The public clings onto every item of clothing, outing, relationship, television show, endorsement, and newly released movie in which our favorite celebrities appear. It is no wonder that the most famous celebrities are usually the highest paid, and whose private lives suffer the most exploitation.

Celebrities are extremely vulnerable to exploitation because their earning potential is based in large part on the value of their image. The image celebrities attain is essentially their appearance, the talent associated with their appearance, and the marketability that results. Celebrities are entitled to the market value their image generates,[1] and to sufficient protection from those who attempt to exploit their celebrity status for their own economic purposes. For example, Michael Jordan has profited from the creation of "Air Jordan" sneakers. Many believe that by purchasing these sneakers, they too can excel in basketball. Jordan has commercialized his ability to play a certain sport. He has projected this ability onto an eponymous line of sneakers. Celebrities such as Jordan seek legal protection because they are continually subject to third parties' intrusive attempts to profit off of their image.[2]

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[1] Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

[2] *E.g.*, Complaint at 6, ¶¶ 29-33, Jordan & Jump 23, Inc., v. Dominick's Finer Foods, L.L.C., (Ill. Cir. Dec. 21, 2009) (No. 2009LO15548) (noting how Jordan sued a grocery store for the unauthorized use of his identity and persona in an advertisement under Illinois Right of Publicity Act, 765 ILL. COMP. STAT. 1075/1-60 (2009)).

Under the right of publicity, courts award compensation for the commercial exploitation of celebrities' name or likenesses.[3] The right of publicity is an intellectual property right that ensures individuals' right to control the commercial use of his or her identity.[4] Celebrities may rely on either the statutory or common law right of publicity to recover from those who wrongfully profit from their image.[5] The following example will illustrate the need for the right of publicity to protect not only celebrities' names and likenesses, but their images and voices as well.

Suppose that the late Michael Jackson appeared in an animated movie, wearing his signature red jacket and white glove.[6] Each participating actor signed a contract allowing the movie studio exclusive use of his image on clothing in connection with the movie's promotion. Now suppose a photographer took pictures of Jackson, screened them onto t-shirts, and sold the shirts to moviegoers on the day of the premiere. The photographer commercially benefits from the wrongful sale of Jackson's image. If Jackson's estate sought recovery under the right of publicity, it would have to establish that the photographer's commercial use of Jackson's name or likeness caused him injury.[7] Retailers and consumers attach the

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[3] *See* 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d Ed. 2010) (reporting that 30 states recognize the right of publicity under the common law, statutory law or both).

[4] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 928 (6th Cir.2003) ("The right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or identity.").

[5] Although not discussed in this article, celebrities and public figures may also seek protection under Unfair Competition laws. Further, where celebrities and public figures own copyrighted works or trademarks, they may protect these from exploitation under Copyright and Trademark laws. This article will focus exclusively on the right of publicity. *See* Robert H. Thornburg, *Intentional Tort Principles and Florida's Constitutional Right of Privacy as Safeguards to Governmental and Private Dissemination of Private Information,* 4 FLA. COASTAL L.J. 137, 146 (2003).

[6] For purposes of this example, assume that Jackson has not retained any copyrights or trademarks on anything associated with his image or enterprise as a singer.

[7] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("Many jurisdictions have not yet considered the descendibility of the right of publicity. Of those jurisdictions that have determined the issue through legislation or common law adjudication, the majority recognize the right as descendible, while in others the assertion of post-mortem rights is precluded by statute of case law."). For example, under California law, the right of publicity will pass to the deceased's heirs, and any violator "shall be liable for any damages sustained by the person or persons injured as

highest value to goods that are not widely distributed. By adding clothes wrongfully bearing Jackson's image to the marketplace, the photographer reduced the relative value of clothes authorized to bear Jackson's image.

Next, suppose a cleaning company outfits an actor in a red jacket and white glove and instructs him to say, "Moon walk your way to a shinier floor," as he holds a mop and moonwalks across a shiny floor. If this use of Jackson's likeness is unauthorized, the right of publicity would enable Jackson's estate to recover damages. The right of publicity protects celebrities and public figures from any exploitation of their image or likeness in connection with commercial products. Thus, while in this scenario the company only uses a Michael Jackson impersonator, there is infringement because the red jacket and white glove are unique to Jackson's image. Similarly, in a commercial for an amusement park, imagine that a Jackson-impersonator is singing the chorus to Jackson's song "Thriller" as an image of the park's newest rollercoaster is displayed across the screen. Here too, Jackson's estate is entitled to compensation for the park's unauthorized use of his voice in conjunction with the sale of goods or services.[8] Jackson does not have a claim for copyright infringement because a copyright action would not provide recovery for the use of his vocal styling.[9] Jackson's estate could bring a claim under the

a result thereof." CAL. CIV. CODE §3344.1(a)(1) (West 1997 & Supp. 2009). Note, however, that under §3344.1(a)(2) the law contains an exemption for uses that occur in a "play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works…if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work." *See also* Astaire v. Best Film Video Corp., 136 F.3d 1208, 1209 (9th Cir. 1998) (use of a deceased dancer in educational and instructional videos, was exempted under CAL. CIV. CODE §990). The California code §990 was later renumbered §3344.1 by Stats.1999, c. 1000 (S.B.284), § 9.5. *See infra* note 91. For purposes of this example, assume that the use of Jackson's image occurs in a state where a celebrity's right of publicity is descendible.

[8] *See* Midler v. Ford Motor Company, 849 F.2d 460, 463 (9th Cir. 1988) (holding that commercial use of an emulation of Bette Midler's voice, without her prior authorization, was actionable, because her voice was distinctive, widely known, and recognizable); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (a person's voice is recognized as an attribute that deserves protection under the right of publicity).

[9] *Midler*, 849 F.2d at 492 ("A voice is not copyrightable. The sounds are not 'fixed.'").

right of publicity for the appropriation of his voice because his singing style is a unique, intangible asset, which undoubtedly increases the value of his image.[10]

Depending on the laws of the geographical location in which a celebrity resides, there are differing levels of publicity protection.[11] Both California and the United Kingdom are home to a large populace of celebrities and public figures. The epicenter of the entertainment industry, California, provides its celebrities with extensive protection under both common law and statutory rights of publicity. In contrast, the United Kingdom does not recognize the right of publicity. This Comment examines how California and the United Kingdom address commercial exploitation of celebrities and public figures. Through its comparison, this Comment determines which location provides celebrities with a wider array of protection, and what types of commercial exploitation celebrities are protected against.

Part II begins with a discussion of the right of privacy, and the subsequent birth of the right of publicity. Part III highlights California's right of publicity, and the rights that the law currently affords celebrities. Part IV discusses the methods through which celebrities and public figures are awarded rights in the United Kingdom. It also explores the current trend towards expansion of celebrities' rights with the enactment of the Human Rights Bill. Part V compares California and the United Kingdom, and discusses the need for modification and harmonization of divergent laws against commercial exploitation.

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[10] *Id.* at 463.

[11] Laws vary greatly between American states as well. For example, California's right of publicity is quite expansive, as state courts recognize both the common and statutory law cause of action for the right of publicity. New York, in comparison, does not recognize a common law right of publicity, and only retains the right statutorily. *See, e.g.,* Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality,* 46 HASTINGS L.J. 856, 856 (1995).

II. HISTORY OF THE RIGHT OF PUBLICITY IN THE UNITED STATES

A. Origins: Right of Privacy

The right of privacy was one of the few sources of relief, other than defamation and libel, that celebrities could turn to when others appropriated their image. As originally proposed in the United States, the right of privacy was described as the right "to be let alone."[12] Liability was imposed on those who caused harm by invading the privacy of others.[13]

The right of privacy is grounded in tort law, and is based upon the work of Samuel D. Warren and Louis D. Brandeis, who co-wrote the influential article *The Right of Privacy*.[14] Warren and Brandeis argued that individuals have the right to protect themselves from invasions into their personal "quiet zone[s]."[15] They believed an individual should control the degree and type of private personal information that is made public.[16] Warren and Brandeis recognized that invasions into one's privacy, specifically invasions resulting in personal information going public,[17] were harmful.[18] They urged society to articulate a "principle which may be invoked to protect the privacy of the individual…from invasion either by the too enterprising press, the photographer, or the possessor of any other modem device for recording or reproducing scenes or sounds."[19] The article primarily focused on private life invasions, and the scope of protection it envisioned was narrow.[20] Despite the publication of Brandeis and Warren's

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[12] THOMAS M. COOLEY, LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed., 1888).

[13] *See* RESTATEMENT (SECOND) OF TORTS § 652A(1) (1977).

[14] Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*. 4 HARV. L. REV. 193 (1890).

[15] *Id.* at 216.

[16] *Id.*

[17] *See* Dorothy J. Glancy, *The Invention of The Right to Privacy,* 21 ARIZ. L. REV. 1, 6 (1979) (noting that the catalyst for Warren's writing the article [*The Right of Privacy*] was his pique upon finding intimate details of his family's home life in the society pages of the local newspaper *The Saturday Evening Gazette*).

[18] Warren & Brandeis, *supra* note 14, at 197.

[19] *Id.* at 206.

[20] *See* Glancy, *supra* note 17, at 6.

article, the right of privacy was still not widely accepted.[21] Courts remained reluctant to provide relief to those whose images were appropriated.[22]

In *Roberson v. Rochester*,[23] a flour mill obtained and sold lithographic prints displaying the plaintiff's unauthorized portrait on its products. The products were in wide circulation. The plaintiff was humiliated when friends and family recognized her image on the goods for sale. She sought an injunction to prevent the products' continued circulation. The plaintiff asked for damages for the mental distress she incurred from "the scoffs and jeers of persons who have recognized her face and picture on this advertisement, and her good name [being] attacked…"[24] The court disagreed, and refused to recognize the plaintiff's right of privacy.[25] In its decision, the court explained that "such publicity, which some find agreeable, is to plaintiff very distasteful…she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty."[26] The court characterized the circulation of the plaintiff's picture as a compliment, rather than an invasion of her privacy, or her right to control the dissemination of her image. Predicting that recognition of a privacy right would open the floodgates for litigation and cause an over-expansion of rights afforded under the right of privacy, the *Robertson* court refused to recognize the plaintiff's privacy right. [27]

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[21] Diane Lieenheer Zimmerman, *Who Put the Right in the Right of Publicity,* 9 DEPAUL-LCA J. ART & ENT. L. 35, 41 (1999) (noting that "although it has been estimated that as many as half of the states in the United States recognize a right of publicity, a careful head count reveals that only about a dozen have taken unambiguous steps to create a true property right").

[22] *See* Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (N.Y. 1902), *superseded by statute,* NEW YORK CIVIL RIGHTS ACT § 50 (1909), *as recognized in* People v. King, 84 N.Y.2d 1034 (N.Y. 1995).

[23] 171 N.Y. 538 (N.Y. 1902).

[24] *Id.* at 542.

[25] *Id.* at 544-45.

[26] *Id.* at 543.

[27] *Roberson*, 171 N.Y. at 545 (N.Y. 1902), *superseded by statute,* New York Civil Rights Act § 50 (1909), *as recognized in* People v. King, 84 N.Y.2d 1034 (N.Y. 1995).

B. Technological Advances and the Recognition of Commercial Exploitation

The advent of new technology facilitated society's growing obsession with celebrities. Technology aided and encouraged a new wave of celebrity exploitation. The 19th century saw the arrival of photography, motion pictures, and radio.[28] The number of methods the media and general public could use to exploit celebrities increased substantially.

Celebrities began to see their images in newspapers and on consumer products. Where these uses were unauthorized, the commercial benefit of the product's celebrity association went exclusively to a third party.[29] Appropriations of this nature were actionable only under the right of privacy, and courts were unwilling to award damages for additional publicity. Wide public exposure was, after all, what celebrities relied on for continued professional success.[30]

C. Prosser and Birth of the Right of Publicity

Celebrities seeking remedy for the commercial misappropriation of their likeness under privacy law[31] were continuously unsuccessful. Courts were reluctant to award damages to those who became well known through intentionally seeking celebrity status.[32] It was courts' reluctance to recognize injury for public exploitation that compelled development of a common law and statutory right of publicity. The right of publicity protects well-known individuals by giving them a right to control the commercial use of their attributes.[33]

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[28] Fox Talbot invented photographs in 1834. Thomas Edison invented the motion picture camera in 1892. The radio was invented by Guglielmo Marconi in 1895. *See* MARY WARNER MARIEN, PHOTOGRAPHY: A CULTURAL HISTORY 17 (2002).

[29] In O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), a famous college football player authorized the publicity department at his university to distribute his picture to newspapers and magazines. The Pabst Brewery Company used the player's picture in its football schedules, wherein the player's image was in close proximity to beer advertisements. The player believed the use of his picture was a violation of his right to privacy because it appeared from the schedules that he was endorsing Pabst beer. The Court held that the player's privacy was not infringed, however, because he had made efforts to become publicly known.

[30] *Id.* at 170.

[31] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

[32] *O'Brien*, 124 F.2d at 170.

[33] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 928 (6th Cir.2003).

The first reference to the right of publicity was in the 1953 case *Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.*[34] There, a baseball player gave a chewing gum company the exclusive right to use his photograph in connection with the sale of its brand name gum. Later, the player entered into a contract with a rival gum manufacturer, which also authorized the use of the player's picture to sell gum. The original company sued the rival company for inducing the player's contract breach. A New York court ruled that the player had granted the original company the exclusive right to use his photograph. In effect, it recognized the player's right of publicity.[35] The court held that the first company, "in its capacity as exclusive grantee of player's 'right of publicity,' has a valid claim against the rival company if the rival company used that player's photograph during the term of the [first company's] grant and with knowledge of it."[36]

The right of publicity was explicitly articulated in 1960, when Dean William Prosser wrote the influential law review article "*Privacy*."[37] Prosser advocated a privacy right to address growing concerns about celebrities' commercial exploitation. In his article, Prosser categorized the invasion of privacy into four separate torts:[38]

1) unreasonable intrusion upon the seclusion of another;
2) appropriation of another's name or likeness;
3) unreasonable publicity given to the other's private life; and
4) publicity that unreasonably places the other in a false light before the public [39]

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[34] 202 F.2d 866, 868 (2d Cir. 1953). The right of publicity was first coined by Judge Jerome Frank in *Haelan* when Frank identified such as a property right.

[35] *Id.* at 868 (holding that "in addition to and independent of that right of privacy (which New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' *i.e.*, without an accompanying transfer of a business or of anything else")

[36] *Id.* at 869.

[37] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

[38] *Id.* at 389. Prosser's delineation of the Right of Privacy was later adopted by the RESTATEMENT (SECOND) OF TORTS § 652 (1977).

[39] *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977) (listing the four ways one's privacy can be invaded).

The second categorization evolved into the modern version of the right of publicity.

In *Zacchini v. Scripps-Howard Broadcasting Co.*,[40] the Supreme Court held that a news company violated Ohio law when it televised a human cannonball performer's 15-second performance without attaining the performer's prior permission.[41] The human cannonball performer sued Scripps-Howard for unlawful appropriation of his professional property.[42] Before Ruling in favor of the performer, the Court balanced the First Amendment rights of the news company with the cannonball performer's right of publicity. It also made a distinction between a false light of privacy case and the right of publicity.[43] The Court explained that states had different interests in the two torts. A state has an interest in permitting a false light of privacy claim because it wants to protect parties' reputations.[44] In contrast, a state's interest in permitting a right of publicity claim is "closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation."[45] The *Zacchini* Court also recognized that there was a difference regarding the "dissemination of information to the public" [46] in right of publicity and false light of privacy cases. The Court stated:

> In 'false light' cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing. An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication. [47]

The Supreme Court held that the broadcast substantially threatened the performer's economic value. Therefore, the

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[40] 433 U.S. 562 (1977).
[41] *Id.* at 575.
[42] *Id.* at 564.
[43] *Id.* at 573.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977).

broadcast was a violation of the performer's right of publicity.[48] The right of publicity preserves the performer's right to receive compensation for his performance, while simultaneously providing economic incentive for the performer to continue performing.[49]

This right of publicity is generally an individual right to control the commercial use of one's name or likeness.[50] The sole requirement for affording protection is that there be some sort of commercial exploitation of the individual. The right of publicity has expanded in many jurisdictions which have recognized it as an extension of privacy rights.

In the United States, the rights afforded to celebrities and public figures vary according to geographical location. The common law right of publicity is not recognized in New York,[51] for instance, but in California the scope of the right is quite broad. An examination of the rights currently afforded to celebrities in California will show how rights have been expanded from Prosser's original conception.

III. MODERN RIGHTS IN CALIFORNIA

A. Introduction

As the hub of the entertainment industry, California is home to a large contingent of celebrities. The incongruous mix of media and celebrity interests in Hollywood precipitated greater protection for celebrities. California's legislature enacted statutory protection for the right of publicity to supplement its common law. While not always the case, today in California, the right of publicity's scope of protection is expansive.

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[48] *Id.* at 575 ("Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance'; if the public can see the act free on television, it will be less willing to pay to see it at the fair.").

[49] *Id*. at 576.

[50] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (noting that it is a violation of the right of publicity when "[o]ne… who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade…").

[51] *See* Rhodes v. Sperry & Hutchinson Co., 85 N. E. 1097 (N.Y. 1908).

B. Common Law Right of Publicity

California is one of the few states to recognize both a common law and statutory cause of action for the right of publicity.[52] In California, the common law right of publicity[53] offers a broader scope of actionable claims than its statutory counterpart.[54] Under statutory law, the type of appropriation, the intent of the infringer, damages, and a connection between the use and the commercial nature of the infringement are all relevant.[55] But similar specificity is not found in the common law, which is comparatively broad in its protection. As such, celebrities have the option to assert a variety of claims under the common law, and courts have the ability to expand protection.[56] Careful analysis of both modes of protection will explain the expansion of the right of publicity.

To secure relief, California common law requires the plaintiff prove the following:

1) The defendant's use of the plaintiff's identity;
2) The appropriation of the plaintiff's name or likeness to the defendant's advantage, commercially or otherwise;
3) Lack of consent; and
4) Resulting injury[57]

The scope of protection afforded celebrities under common law once limited the attributes of a celebrity that were actionable.[58] Previously, only the use of a celebrity's identity, name, or likeness was actionable under common law.[59] The common law later expanded to make more attributes of a celebrity actionable under the right of publicity. The common law does not require infringers' intent in appropriating

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[52] 1 MCCARTHY, *supra* note 3, at § 6:3 (as of 2009, 20 states recognize the common law right of publicity).

[53] *See, e.g.*, Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983) *superseded in part by statute*, CAL. CIVIL CODE §3344 (West 1997 & Supp. 2009).

[54] CAL. CIV. CODE §3344 (originally enacted as §990).

[55] *Id.*

[56] *See Eastwood*, 198 Cal.Rptr. at 347.

[57] *Id.*; *see* KNB Enter. v. Mathews, 92 Cal. Rptr. 2d 713 (Cal. Ct. App. 2000).

[58] *Eastwood*, 198 Cal. Rptr. at 347.

[59] *Id.*

celebrities' identities.[60] At times, an infringer may mistakenly or inadvertently use one's identity, name or likeness.[61] A lack of intent to exploit another's identity is not a defense under the common law.[62] Additionally, the commercial appropriation or otherwise requirement is extremely broad and provides celebrities with even more protection.[63]

The rationale for providing celebrities with a right of publicity is to give them control over the commercial appropriation of their attributes.[64] Celebrities' need for such protection is premised on the fact that their ability to make a living is based on the commercial value of their image. Appropriately, California's common law gives individuals the right to bring proceedings against those who have appropriated their attributes for commercial purposes. But the common law also leaves an opening for expansion of that right. Namely, the common law stipulates that appropriation of one's identity is actionable if it is done "commercially, or otherwise."[65] California courts have addressed types of appropriations that fall under "commercial," but they have left open causes of action that may fall under the rubric of "otherwise."

A commercial use is present when a party uses the plaintiff's identity, name, or likeness in a study aid,[66] or in conjunction with a commercial advertisement.[67] In *Fairfield v. American Photocopy Equipment Company*,[68] American Photocopy disseminated an advertisement primarily to legal professionals, with the names of attorneys and law firms purportedly using and

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[60] *See* Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001); Butler v. Target Corp., 323 F.Supp.2d 1052, 1056 (C.D. Cal. 2004); Eastwood v. Superior Court, 198 Cal. Rptr. 343, *superseded in part by statute*, CAL. CIV. CODE §3344 (West 1997 & Supp. 2009).

[61] *See* CAL. CIV. CODE §3344 (West 1997 & Supp. 2009).

[62] *See Downing*, 265 F.3d at 994; *Butler*, 323 F.Supp.2d at 1052; Eastwood, 198 Cal. Rptr. 3d at 342.

[63] *See Eastwood,* 198 Cal.Rptr. at 347.

[64] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

[65] *Id.*

[66] *See* Williams v. Weisser, 78 Cal. Rptr. 542 (Cal. Ct. App.1969) (holding that when a business hired an agent to take class notes and create study aids, which bore the name of the plaintiff professor, the plaintiff had a valid claim for the appropriation of his name).

[67] Fairfield v. Am. Photography Equip. Co., 138 Cal. App. 2d 82, 291 P. 2d 194 (Cal. Dist. Ct. App. 1955), *superseded in part by statute,* CAL. CIVIL CODE § 3344 (West 1997 & Supp. 2009).

[68] 138 Cal. App. 2d 82, 291 P. 2d 194 (Cal. Dist. Ct. App. 1955).

praising its photocopy machines. The plaintiff's name and location were used without his permission, and without regard to the fact that the plaintiff had returned his machine to the company.[69] Because the company used the attorney's name without his authorization in connection with a commercial product, the attorney's right of publicity claim was actionable. However, not all commercial uses are actionable under the common law. [70]

Courts have stated that the common law right of publicity cannot provide relief each time one's name or likeness is published without one's permission.[71] Courts conduct a balancing process by weighing "the nature of the precise information conveyed and the context of the communication to determine the public interest in the expression."[72] Although the common law right of publicity provides a seemingly larger scope of protection than its statutory counterpart, it is limited in some respects. Courts will not award relief if the alleged infringing use occurred in conjunction with a newsworthy event, for instance. Additionally, an action for infringement of the right of publicity can only be brought during a celebrity's lifetime.[73] The common law does not provide for publicity claims post mortem.

C. Civil Code §3344

The statutory cause of action under California's Civil Code differs from the common law cause of action in two primary ways. First, only the appropriation of individuals' identity or likeness for purposes of advertising, selling, or solicitation are actionable under section 3344.[74] Additionally, the code requires a claimant to show the defendant used her image or likeness for

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[69] *Id.* at 196.

[70] *E.g.,* Gionfriddo v. Major League Baseball, 114 Cal. Rprt. 2d 307 (Ct. App. 2001) (holding that defendant's publishing past team records, photographs, and player statistics in video histories and online content was for a purpose related to their profession and did not constitute "commercial" use).

[71] *Id.* at 409.

[72] *Id.* at 410.

[73] *See* Guglielmi v. Spelling – Goldberg Productions, 25 Cal. 3d 860, 160 Cal. Rptr. 352 (1979) (holding that the right of publicity is not descendible), *superseded by statute,* CAL. CIV. CODE § 3344.1(d) (West 1997 & Supp. 2009).

[74] CAL. CIV. CODE § 3344(a) (West 1997 &West Supp. 2009).

a commercial purpose.[75] Second, California Civil Code specifies that an infringer must "knowingly use" another's attributes without consent.[76] In contrast, under the common law, mistaken or inadvertent use of a celebrity's identity or likeness is actionable.[77]

D. Expansion of Common Law Protection and Civil Code §3344.1

A celebrity's control over the commercial appropriation of her attributes was once protected in limited form under California's common law and statutory cause of action for the right of publicity. As new methods of exploitation arose, the courts expanded the common law right of publicity to provide relief not otherwise protected under Civil Code section 3344. Additionally, California statutes were amended to provide stronger protection for celebrities. The scope of protection available to celebrities in California has expanded in three fundamental ways.[78]

Recently, courts provided protection against the appropriation of one's voice. In *Midler v. Ford Motor Company*,[79] Bette Midler sought relief from Ford after the company used a voice that resembled hers in a commercial for its cars. The court recognized that a voice could be distinctive of character. Thus, when Ford used Midler's voice without her permission, Ford violated Midler's right of publicity.[80] The court could not award relief under California Civil Code section 3344 because the statute provides protection only when the celebrity's actual voice is used. Here, the advertisement used an imitation of Midler's voice.[81] Where the claim of appropriation fell short of the requirements to gain relief under section 3344,

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[75] *Id.* at § 3344(e).

[76] *Id.* at § 3344(a).

[77] *See* Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Ct. App. 1983), *superseded by statute,* Cal. Civ. Code §3344 (West 1997 & Supp. 2009), *as recognized in* KNB Enter. V. Matthews, 92 Cal. Rptr. 2d 713, 717 n.5 (Ct. App. 2000).

[78] *See* 1 MCCARTHY, *supra* note 3, at 6:47.

[79] 849 F.2d 460, 463-64 (9th Cir. 1988) (noting that plaintiff's failure to satisfy a statutory cause of action does not preclude her claim of infringement under the common law).

[80] *Id.* at 464.

[81] *Id.* at 461, 463.

the common law responded by recognizing the appropriation as a valid claim under the right of publicity. However, if the common law cause of action were not expanded, and still only protected the use of a celebrity's identity, name, or likeness,[82] Midler would have been without reprieve. The expansion proves beneficial to celebrities who, through the use of media, have become widely recognizable to the public for more than just their image. Today, celebrities regularly commercialize the recognition and subsequent marketability of their voices.[83]

The common law similarly expanded the scope of relief afforded to claims for infringement of likeness. Typically courts held that an unauthorized appropriation of a celebrities' likeness was actionable only when used in a picture or for commercial purposes.[84] However, the common law has extended this protection to situations where a picture is not used.[85] In *White v. Samsung Electronics America Inc.*[86], Samsung used a robot depicting Vanna White in one of its advertisements. The Court held that a robot dressed in a gown, adorned with a blond wig and jewelry, standing next to a board that resembled the game show "Wheel of Fortune" did amount to a wrongful appropriation of White's likeness.[87] White's claim failed under California Civil Code section 3344 because the robot did not sufficiently portray specific features of White's image.[88] Nevertheless, the Court interpreted the common law to include White's cause of action as a violation of her right of publicity.[89]

Finally, enactment of California Civil Code's section 3344.1, otherwise known as the "Astaire Celebrity Image Protection Act,"[90] expands protection of celebrities' right of

[82] *Eastwood,* 198 Cal. Rptr. at 347.

[83] *See, e.g.*, SHARK TALE (DreamWorks Animation 2004) (animated movie featuring voiced parts by celebrities Will Smith and Robert DeNiro).

[84] Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 281 (9th Cir. 1974) (finding that plaintiff had a valid cause of action for violation of his right of publicity after defendant used his likeness in an advertising image).

[85] White v. Samsung Electronics Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (holding that defendant advertising company appropriated White's identity when dressing a robot in resemblance of her television persona as hostess of a game show).

[86] *Id.*

[87] *Id.* at 1399.

[88] *Id.* at 1397.

[89] *Id.* at 1399.

[90] CAL. CIV. CODE § 3344.1 (West 1997 & Supp. 2009).

publicity after death. Civil Code section 3344.1[91] protects the unauthorized use of a deceased personality's name, picture, voice, signature, or likeness for purposes of advertising, selling or solicitation.[92] Prior to enactment of section 3344.1, California courts were forced to adhere to the standard set in *Lugosi v. Universal Pictures*.[93] Under this standard, there was no post mortem right of publicity.[94] Section 3344.1 expanded common law restrictions on inheritability and transferability by allowing the right to run for seventy years[95] following the death of the individual.[96] The expansion of this right protects a celebrity from exploitation of her image after death.

E. The Right of Publicity as Property: Goldman v. Simpson

California has adapted to the growing needs of celebrities by expanding the scope of publicity protection offered to individuals. Most recently, the issue of stripping individuals of their publicity rights has confronted California courts.[97] This issue arose as a result of a civil action lawsuit and unfulfilled civil judgment after the acquittal of Orenthal James Simpson on October 3, 1995 for the murders of Nicole Brown Simpson and Ron Goldman.[98]

The Goldman and Brown families filed wrongful death civil suits soon after Simpson was acquitted. On February 4, 1997, a civil jury found Simpson liable for the deaths of Brown and Goldman. The Court awarded the families $8.5 million in compensatory damages, and $25 million in punitive damages.

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[91] California's Civil Code section 3344.1 was originally numbered section 990, until 1988 when state legislature renumbered the provision.

[92] CAL. CIV. CODE § 3344.1(a) (West 2009).

[93] 603 P.2d 425 (Cal. 1979).

[94] *Id.* at 431.

[95] CAL. CIV. CODE § 3344.1(g) (West 1997 & Supp. 2009).

[96] Before its change to section 3344 in 1988, the Code's section 990 provided that the right of publicity was not freely transferable unless one's identity was commercially valuable at his or her time of death.

[97] Laura Hock, Comment, *What's In A Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities*, 35 PEPP. L. REV. 347, 353 (2008) (citing *Ron Goldman's Dad Asks for Rights to O.J. Simpson's Image to Pay Off Judgment*, FOXNews.com, Sept. 5, 2006, http://www.foxnews.com/story/0,2933,212338,00.html).

[98] Hock, *supra* note 97, at 349 (citing GILBERT GEIS & LEIGH B. BIENEN, CRIMES OF THE CENTURY: FROM LEOPOLD AND LOEB TO O.J. SIMPSON 171 (Northwestern University Press 1998)).

Goldman's share of the award totaled approximately $20 million.[99] To date, Simpson has not paid the award.

In 2006, Simpson became the subject of controversy when he sought to release a book entitled "If I Did It, This Is How It Happened." The book described, hypothetically, how Simpson could have committed the Brown and Goldman murders.[100] On September 5, 2006, Frederic Goldman, the late Ron Goldman's father, filed a petition in the Los Angeles Superior Court before Judge Linda Lefkowitz. Goldman urged the Court to assign and transfer Simpson's right of publicity to partially satisfy Goldman's portion of the unpaid civil judgment.[101] This was California's first consideration of whether the state could forcibly assign a celebrity's right of publicity in satisfaction of a judgment.[102]

Goldman argued that the right of publicity was a property and commercial right subject to assignment.[103] In October 2006, the Court denied Goldman's motion for the transfer of Simpson's right of publicity in satisfaction of his outstanding

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[99] Hock, *supra* note 97, at 353 (citing *Jury Orders Simpson to Pay $25 million*, USA TODAY, Feb. 11, 1997, *available at* http://www.usatoday.com/news/index/nns216.htm); *see also* Tal Ganani, Note, *Squeezing the Juice: The Failed Attempt to Acquire O.J. Simpson's Right of Publicity, and Why It Should Have Succeeded*, 26 CARDOZO ARTS & ENT. L.J. 165, 177 (citing Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 523 (Cal. Ct. App. 2001)).

[100] *See* Hock, *supra* note 97, at 348 (citing Robin Abcarian & Martin Miller, *Simpson to Tell How He Could Have Killed Pair*, L.A. TIMES, Nov. 16, 2006 at B1, *available at* http://www.latimes.com/news/local/la-me-simpson16nov16,0,2263906.story; Martin Miller, Meg James & Gina Piccalo *Simpson Book, TV Plan Dropped*, L.A. TIMES, Nov. 21, 2006, at A1); *see also* Ganani, *supra* note 99, at 166 (citing *Publisher Dubs O.J. Simpson Chat a 'Confession'; Victims' Families Lash Out*, FOXNews.com, Nov. 16, 2006, http://www.foxnews.com/story/0,2933,229907,00.html).

[101] Ganani, *supra* note 99, at 167 (citing Notice of Motion and Motion by Plaintiff Frederic Goldman for Order Transferring and Assigning Right of Publicity of Defendant and Judgment Debtor Orenthal James Simpson, Goldman v. Simpson, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 17, 2006) [hereinafter Motion for and Assignment of Right of Publicity].

[102] Ganani, *supra* note 99, at 167 (citing *Goldmans Seek Control of O.J. Simpson's Right to Publicity*, CNN.com, Sept. 6, 2006, http://www.cnn.com/2006/LAW/09/05/oj.simpson/index.html); *see also* Hock, *supra* note 97, at 353-54 (discussing novel request for court to forcibly take publicity rights as payment for a judgment (citing *Ron Goldman's Dad Asks for Rights to O.J. Simpson's Image to Pay Off Judgment*, FOXNews.com, Sept. 5, 2006, http:// www.foxnews.com/story/0,2933,212338,00.html)).

[103] Ganani, *supra* note 99, at 183-84 (citing Motion for and Assignment of Right of Publicity, *supra* note 101, at 4-5); Hock, *supra* note 97, at 373 (citation omitted).

civil judgment.[104] Judge Lefkowitz held that a celebrity's right of publicity protected important dignitary interests. She expressed concern that the assignment of such rights might allow creditors to "manage the performers' appearances."[105] Concerned about potential instances of involuntary servitude, the court denied Goldman's claim.[106]

Although Goldman was unable to convince the Court that the right of publicity could be a property interest separate from the personal right of publicity, this novel approach will likely be an issue that California courts will face again.

IV. UNITED KINGDOM

A. Introduction

Unlike California, the United Kingdom recognizes no definitive right of publicity. Politicians and the judiciary have long contemplated such a right but the measure is continually met with public resistance.[107] There is great concern that recognizing a right of publicity would limit the ability of newspapers to bring stories to the public. The public is suspicious that such a right would restrict the media's freedom of expression, and open the press to a flood of litigation.[108]

The lack of a comprehensive right of publicity makes it difficult for celebrities in the U.K. to obtain relief when their image is commercially exploited. Moreover, when courts do award compensation, the relief given is nominal at best.[109] The Human Rights Act of 1988[110], a relatively new provision of law in the United Kingdom, does recognize a right of privacy.[111]

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[104] Ganani, *supra* note 99, at 168 (citing Goldman v. Simpson, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2006)).

[105] Ganani, *supra* note 99, at 168 (citing citing Goldman v. Simpson, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

[106] Ganani, *supra* note 99, at 168.

[107] *See generally* Basil Markesinis et al., *Concerns and Ideas About the Developing English Law of Privacy*, 52 AM. J. COMP. L. 133 (2004).

[108] *Id.*

[109] Douglas v. Hello! Ltd., [2003] EWHC 786 (Ch.), [2003] 3 All E.R. 996 (Eng.).

[110] Human Rights Act, 1988 c. 42 (Eng.).

[111] Article 8 of the Human Rights Act provides that everyone has the right to respect in their private and family lives. The article prevents public authority from infringing these rights, except in of the interest of national security, public safety, or

But, as discussed in the following section, the protection provided is still inadequate. After Princess Diana's death, the Press Complaints Commission ("PCC") revised its code of practice to include regulation of photographers. However, the PCC was established and funded by newspapers "so they can regulate itself."[112] The PCC's conflict of interest in regulating media members along with protecting private citizens can result in weak enforcement of the code.[113]

B. Intellectual Property Causes of Action

Intellectual property law affords celebrities relief via three specific mechanisms: the Copyright, Designs and Patents Act of 1988 ("CDPA"),[114] the Trade Marks Act,[115] and the common law cause of action for passing off.

1. Copyright, Designs and Patents Act of 1988

The CDPA[116] is unlikely to provide relief to celebrities who have not secured or are unable to secure copyright protection for their artistic talents. Under the Act, copyright owners are able to prevent others from using or reproducing original artistic works, photographs, drawings or any copyrightable material.[117] A plaintiff must establish British citizenship and ownership of the work that was allegedly reproduced, published, or infringed upon in the United Kingdom in order to pursue a copyright infringement claim.[118] Celebrities are not protected where their artistic talents do not fit within the confines of the definition of a copyrightable work.[119] Talents not protected are a celebrity's ability to delve into the inner workings of a character in a movie; a singer's ability to reach a certain musical pitch; or an athlete's strategy or method of playing a particular sport. As

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preservation of others' freedom. Human Rights Act, 1998, c. 42, sch.1, pt. I, art. 8 (Eng.).

[112] Marc P. Misthal, *Reigning In the Paparazzi: The Human Rights Act, The European Convention on Human Rights and Fundamental Freedoms, and The Rights of Privacy and Publicity in England*, 10 INT'L LEGAL PERSP. 287, 307 (1998).

[113] *See* discussion *infra* Part IV.C.2.

[114] Copyright, Designs and Patents Act, 1988, c. 48 (Eng.)

[115] Trade Marks Act, 1994, c. 26 (Eng.).

[116] Copyright, Designs and Patents Act, 1988, c. 48 (Eng.).

[117] *Id.*

[118] *Id.* § 154.

[119] *Id.* § 1.

such, the CDPA is unlikely to afford celebrities wide protection over the commercial appropriation of their attributes.

2. Trade Marks Act

Celebrities in the U.K. are also unlikely to find success in garnering relief under the Trade Marks Act.[120] The Trade Marks Act provides protection of names, letters, designs, or symbols that distinguish the trademark owner's goods from the goods of a competitor.[121] Celebrities have attempted to trademark names or symbols associated with their names,[122] but courts have been reluctant to afford protection where there is no likelihood of confusion as to the source of the goods promoted.[123] Accordingly, celebrities often resort to other causes of action, such as "passing off" in an attempt to seek relief.

3. Passing Off

The common law cause of action for passing off has recently been recognized as a viable cause of action for celebrities in the U.K.[124] Passing off arises primarily when an individual represents that goods belonging to another are his own.[125] In an action for passing off, the plaintiff must prove three things. First, the good will or reputation attached to a product must be distinctive of the plaintiff. Second, a plaintiff must prove that an individual buying the goods could believe that the defendant's products are the plaintiff's products. Third, a plaintiff must prove that he suffers harm as a result of the confusion.[126]

Celebrities have only recently been able to seek relief when their reputation is attached to goods or services they did not

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[120] Trade Marks Act, 1994, c. 26 (Eng.).

[121] *Id.* § 1(1).

[122] *See* Lyngstad v. Anabas Prods. Ltd., [1977] F.S.R. 62 (Ch.); *In re* Elvis Presley Trade Marks, [1997] 13 R.P.C. 543 (Ch.), *aff'd*, [1999] 16 R.P.C. 567 (A.C.).

[123] *In re* Elvis Presley Trade Marks, [1997] 13 R.P.C. 543 (Ch.), *aff'd*, [1999] 16 R.P.C. 567 (A.C.) (holding that a company's use of the name "Elvis" in the United Kingdom did not preclude registration of "Elvis Presley" by Elvis Presley Enterprise, Inc., as such was unlikely to cause public confusion).

[124] *See* Irvine v. Talksport Ltd., [2002] EWHC 367 (Ch.), [2002] 2 All E.R. 414.

[125] *See* Reddaway v. Banham, [1896] A.C. 199, 204.

[126] *See* Reckitt & Coleman Prods v. Borden, Inc., [1990] R.P.C. 341, [1990] 1 W.L.R. 491 (H.L.) (Eng.) (Ch.).

personally endorse.[127] In *Irving v. Talksport, Ltd.*,[128] a radio station used an image of Irving, a prominent driver on the racing circuit, in an advertisement for its sports talk program. Irving carried a portable radio in the advertisement, which was meant to generate interest in the station's sports programming. The British High Court of Justice held that Irving was able to recover for the unlicensed appropriation of his goodwill or reputation.[129] The court outlined the two-part test necessary to claim passing off in a false endorsement case.[130] First, a plaintiff must show that at the time of the complaint, he or she had a prominent reputation or goodwill. Second, the defendant's actions must have relayed a false or misleading message that the goods were endorsed by the plaintiff.[131] As the court appropriately recognized, celebrities seek to exploit their personality and image commercially.[132] Therefore, celebrities are entitled to recover when another attempts to falsely portray their endorsement of goods and services.

While passing off has the potential to provide celebrities with relief for the exploitation of their reputation or goodwill through the commercial use of their attributes, the relief provided is nominal.[133] For example, Tiger Woods, a well known golfer, has a contract with Buick where he appears in their commercials promoting the purchase of their vehicles. If Honda were to air commercials using Tiger Woods's image, Tiger Woods would have a claim against Honda for passing off. Honda would be liable in this case, because it appropriated Woods's image and the goodwill associated with Woods's golf talent, and then sent the public a false message that he endorsed their vehicles. Honda's misappropriation could damage Woods's goodwill and his contractual relationship with Buick. However, if Woods were to bring a claim for passing off in the

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[127] *See, e.g.,* Irvine v. Talksport Ltd., [2002] EWHC 367 (Ch.), [2002] 2 All E.R. 414. (English court does not award relief to a Celebrity's claim of passing off).

[128] *Id.*

[129] *Id.* at 2379.

[130] *Id.* at 2369-70.

[131] *Id.*

[132] *Id.* at 2378-79.

[133] *See* Irvine v. Talksport Ltd., [2002] EWHC 367 (Ch.), [2002] 2 All E.R. 414., (holding that although the defendant radio station spent approximately £11,000 distributing brochures falsely indicating racecar driver as a celebrity endorser of its radio programs, the court only awarded the racecar driver relief of £2000).

United Kingdom, he would not gain relief commensurate with the commercial gain Honda received as a result of its wrongful exploitation.[134]

C. Industry Specific Regulatory Codes

1. The Advertising Codes

The British Advertising Codes, while capable of protecting celebrities from unwanted associations, are limited in the type of protection they afford. The British Advertising Codes seek to protect celebrities from unfair portrayal, reference, or endorsement of a product without their prior permission.[135] The Codes regulate the advertising industry by urging advertisers to obtain the written permission of celebrities before portraying them in their advertisements or marketing materials.[136] The Advertising Codes' protection is limited in several ways. First, where the marketing material portrays a celebrity and relays information consistent with the views of the celebrity, prior permission as to the use of the celebrity's image is unnecessary.[137] Second, the portrayal of deceased celebrities is allowed, as long as such use does not offend or cause distress to the deceased's family or loved ones.[138] Finally, and perhaps most importantly, a breach of the Codes is unenforceable in a court of law.[139] While the Advertising Codes have been successful in eliminating ads that make unauthorized use of celebrities,[140] the lack of judicial enforcement may encourage those governed by the Codes to violate them. Moreover, once an advertisement is displayed, its proponent has already profited. For example, the association of an offending commercial's goods with a celebrity's goodwill occurs upon release of the

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[134] *See id.*
[135] British Code of Advertising Practice § 13.1 (2003) (Eng.).
[136] *Id.*
[137] *Id.* §13.2.
[138] *Id.* §13.3.
[139] *Id.* § 60.26.
[140] Hayley Stallard, *Symposium International Rights of Publicity: The Right of Publicity in the United Kingdon*, 18 LOY. L.A. ENT. L.J. 565, 574 (1998) (describing an international soccer star's successful misrepresentation claim against beer company Molson, after Molson used a model in the soccer player's likeness in commercial advertisements) (citation omitted).

advertisement. Removing such an ad does not alleviate the damage done to the celebrity. The Codes' lack of an enforcement mechanism, coupled with potential incentives to violate them, leaves victims without adequate relief. As such, celebrities often turn to the PCC.[141]

2. The Press Complaints Commission

Since the death of Princess Diana, the PCC[142] has changed its code to ensure stricter guidelines in regulating the newspaper industry. The PCC's code contains provisions delineating an individual's right to privacy in their personal and family lives.[143] Additionally, it restricts the means by which newspapers and journalists may obtain celebrity images, by preventing the use of clandestine devices.[144] The PCC suffers some of the same shortcomings as the Advertising Codes. Both are unable to enforce their codes judicially. Additionally, both fail to provide financial relief to those whose image is commercially exploited. As mentioned earlier, the PCC was established by newspapers. It is both impractical and a conflict of interest to leave enforcement of industry codes to those who stand to benefit from non-compliance.[145] If the industry in which the abuse arises is left to decide the boundaries of appropriate behavior, those boundaries will inevitably expand. It may get to a point where any act on the part of either advertisers or newspapers becomes acceptable. Judicial enforcement of such protections is necessary and may be sought through the Human Rights Act.

D. The Human Rights Act

The Human Rights Act of 1998[146] ("HRA") fails to provide protection against the commercial appropriation of celebrities'

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[141] *See generally* Press Complaints Commission, What is the PCC?, http://www.pcc.org.uk/about/whatispcc.html (last visited Oct. 5, 2009) (explaining the PCC's adjudication of complaints concerning editorial content in newspapers and magazines).

[142] Press Complaints Commission, The Evolving Code of Practice, http://www.pcc.org.uk/cop/evolving.html (last visited Oct. 9, 2009).

[143] Press Complaints Commission, Editors' Code of Practice art. 3(i) (2007), http://www.pcc.org.uk/assets/111/Code_Aug_2007.pdf.

[144] *See id.* at art. 10(i).

[145] *See Douglas v. Hello! Ltd.,* [2001] 2 All E.R. 289, 309, [2001] 1 FLR 982 (Eng.).

[146] Human Rights Act, 1998, c. 42 (Eng.).

attributes. Article eight of the HRA holds that individuals have a right of privacy, which may not be infringed upon by public authority, unless for purposes of national security and public safety.[147] Celebrities are slowly gaining rights to protect their private lives, but a blind eye is turned on celebrities' ability to control the commercial exploitation of their image. Many have indirectly sought protection of commercial interests through the HRA privacy provision.[148] One influential case involving two well known celebrities, brought about what may be called the recognition of the common law right of privacy.

In *Douglas v. Hello! Ltd.*,[149] Michael Douglas and Catherine Zeta Jones had signed a contract with Ok! Magazine. The contract assigned Ok! exclusive rights to the photographs from Douglas' upcoming wedding, as well as the right to use attending celebrities' names, voices, and signatures. Douglas went to great measures to ensure that prohibited photographs were not taken during the event. Later, it was discovered that Ok! Magazine's rival, Hello! Magazine, had obtained pictures of the weeding, and that it planned to publish them. Douglas sought an injunction against the use of the pictures. He filed suit against Hello! claiming breach of confidence. The court balanced the celebrity's privacy interests, as established in HRA article eight, against the freedom of expression granted to the press in HRA article ten. The court held that when "[e]lements that would otherwise have been merely private became commercial, the Hello! defendants had acted unconscionably and that by reason of breach of confidence were liable to all three claimants to the extent of the detriment."[150]

A claim for breach of confidence is distinct from the privacy protection afforded under HRA article eight, but the two work in conjunction. The HRA requires courts to consider the rights contained in the Act in their interpretation of the common law.[151] Things considered "private" under article eight are also classified as confidential, and therefore capable of being brought

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[147] *Id.* at part 1, art. 8.

[148] *See, e.g.,* Douglas v. Hello! Ltd., [2001] 2 All E.R. 289 (Eng.).

[149] *Id.*

[150] Douglas v. Hello! Ltd., [2003] EWHC 786 (Ch.) para. 227, [2003] 3 All E.R. 996 (Eng.).

[151] B.S. Markensis, *Concerns, Ideas About the Developing English Law of Privacy,* 52 AM. J. COMP. L. 133, 141 (2004).

under the breach of confidence cause of action.[152] The *Douglas* Court apportioned damages, with Ok! Magazine receiving £1,033,156,[153] while Douglas received £14,600.[154] The amount of damages awarded to Douglas is a clear indication of courts' reluctance to award money to celebrities who seek relief for commercial appropriations of their attributes.[155] The Court refused to liken celebrities' ability to control their commercial attributes to an intrusion of privacy. It awarded Douglas and Zeta Jones trivial damages in comparison to what it awarded Ok! Magazine.[156] The Court considered the loss to Ok! if it were deprived of its exclusive right to publish the photos. However, the court failed to consider the loss inflicted on the celebrities due to the unauthorized use of their image by a magazine they had no contract with.

V. WHERE ARE CELEBRITIES BETTER PROTECTED?

This Comment analyzed celebrities' protection from commercial exploitation in two geographical locations. What remains is the question of where celebrities are better protected, in terms of preventing and remedying infringement on their rights to profit from their image.

Observing differences in relation to the *Douglas* case provides some insight, not only into where celebrities are better protected, but also into varying societal interests that underlie the legal systems of the United Kingdom and California. In California, both common and statutory laws regarding the right of publicity have been enacted to protect the interests of celebrities. California courts balance interests, but usually the needs of the celebrity are given higher regard than the public and media interests at stake.[157] In the United Kingdom, the

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[152] *Id.*

[153] Using currency exchange rates for the week ending in December 22, 2000 , the value of the damages received by Ok! Magazine were approximately $1,522, 561.99 while Michael Douglas and Catherine Zeta Jones received only $21,516 combined. *See generally* Federal Reserve Bank, Exchange Rates for the Week of Dec. 22, 2000, http://www.federalreserve.gov/releases/h10/20001226/ (last visited Oct. 9, 2009).

[154] *Id.*

[155] Douglas v. Hello! Ltd., [2001] 2 All E.R. 289 (Eng.).

[156] Markensis, *supra* note 151, at 174.

[157] *See* Eastwood v. Superior Court, 149 Cal.App.3d 409, 425 (Cal. Ct. App. 1983); 1 MCCARTHY, *supra* note 3, at § 6:18.

system works quite oppositely. Courts routinely protect the press and the public's freedom of speech and expression, at a cost to celebrities' right to control the commercial use of their attributes. Although the United Kingdom's approach seems to disfavor celebrities, the creation of The Human Rights Act and increasing controls over the press and advertising industry indicates a trend towards greater protection for celebrities.

In the *Douglas* case, for instance, a wedding picture portraying the celebrities' image was a commodity that Douglas was entitled to control. In California, celebrities can bring a myriad of claims regarding exploitation of their image. But the California legislature has not addressed the biggest factor spurring celebrities' exploitation in the media-- the paparazzi. While the *Douglas* court only awarded the celebrities nominal damages, there appears to be a greater control over, and better regulation of the paparazzi in the United Kingdom. A need for increased regulation of the paparazzi arose following the death of Princess Diana. Methods of obtaining pictures through harassment or aggressively following individuals were curtailed legislatively. Today, similar conduct is improper under the Code of Practice. Similar regulation in California is necessary.

When it comes to the right of celebrities to control the commercialization of their attributes, California appears to provide individuals with greater protection than the United Kingdom. The system in the United Kingdom is not without its merits, however. There, courts look beyond commercial interests at stake and protect individuals indirectly, through stricter regulation of the press and advertising industries.

The degree to which celebrities are protected varies greatly depending on the state or country in which they reside. Observing different modes of protection in California and the United Kingdom makes it clear that there is a need for modification of the rights celebrities are afforded. A global harmonization of these rights would prevent one society or country from over expanding the rights of the famous at the expense of the general public. The modification of celebrity rights is necessary. The control given to celebrities in California is arguably excessive. Celebrities in California could potentially claim that even the use of a body part bearing a slight resemblance to theirs, constitutes an infringement of their commercial rights. There is a need for specificity in regards to

the attributes that celebrities are entitled to protect. Clarifying rights afforded celebrities can help solve problems of forum shopping resulting from disparate damage awards individuals receive in different jurisdictions.

Celebrities should, at a minimum, be entitled to protect their identity, image, and voice. At an absolute maximum, the right should be extended to a celebrity's signature. The right of publicity should not protect attributes that non-celebrities may share, such as a name. Celebrities should have protection for their identity, image, and voice, because these are attributes that have made them famous. Additionally, those who make a living on their ability to sing should have protection against the commercial appropriation of their voice or vocal likeness. The right of publicity should not be transferable after death, however.[158] Once a celebrity has passed away, a claim for unjust enrichment does not make sense because another's commercial use of the celebrity's image cannot cause injury.[159] Advances in society are propelled by expansions on inventions originally made by others.[160] Innovation is stunted when a celebrity can control the use of his or her image or attributes after death. Furthermore, the justification for giving celebrities control over the commercial use of their attributes, was to enable the celebrity to profit instead of others doing so at their expense.[161] When a celebrity has passed away, it is difficult to see how they are financially hurt by another's use of their image. Heirs do not personally embody the attributes that were valuable to the celebrity. With the exception of uses that would

[158] *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 846-47 (1979); Price v. Hal Roach Studios, Inc., 400 F.Supp. 836, 844 (S.D.N.Y. 1975); Factors Etc., Inc. v. Creative Card Co., 444 F.Supp. 279, 284 (S.D.N.Y. 1977); *but see* Memphis Development Foundation v. Factors Etc., Inc., 441 F.Supp. 1323, 1330 (W.D. Tenn. 1977).

[159] Lugosi v. Universal Pictures, 25 Cal. 3d 813, 846-47 (1979) ("With death, the individual's need to control the commercial uses of his identity as an adjunct to his career ceases.").

[160] Lior Zemer, *The Copyright Movement,* 43 SAN DIEGO L.REV. 247, 282 (2006) ("[A]uthorial and artistic properties are limited ab initio due to the dependency on the contribution of the public. The creative act combines the contribution of the collective and that of the individual authors.").

[161] *See* Rogers v. Grimaldi, 875 F.2d 994, 1003-04 (2d Cir. 1989) ("The common law right of publicity, where it has been recognized, grants celebrities an exclusive right to control the commercial value of their names and to prevent others from exploiting them without permission.").

taint the image or harm the reputation of celebrities, public uses of deceased celebrities' attributes should be "fair game."

Modifying the rights afforded celebrities may alleviate the wide spectrum of damages awarded in litigation. This would solve the problem of forum shopping by aggrieved individuals. As it stands, public figures and entertainment companies choose to conduct business in areas that provide the greatest protection of their rights of privacy and publicity. They also choose places where they believe they will obtain the largest relief should a violation occur. When there is a modification of the rights afforded to celebrities, they will be able to attain comparable protection of their attributes and receive similar damages, regardless of the jurisdiction they live or work in.

VI. CONCLUSION

The rights afforded to celebrities vary greatly depending on their geographical locale. California's recognition of both common and statutory law right of publicity enables celebrities to receive expansive protection from unauthorized commercial use of their attributes. In contrast, celebrities in the United Kingdom resort to other causes of action to secure relief. Analysis of both California's and the United Kingdom's approach to celebrity protection sheds light on both geographic locations' social values. California strongly enforces celebrities' right of publicity. On the other hand, the system established in the United Kingdom tends to tilt the balance in favor of the press. In light of these differences, there is a need for modification of celebrities' rights, to create more uniformity. Celebrities are often given expansive rights at the expense of the general public. If such rights are not modified, they may infringe on the public's freedom of speech. Celebrities are entitled to reap the benefits of their status. Nevertheless, measures are needed to ensure that we do not protect celebrities at too great a cost to fundamental rights and freedoms of non-celebrities.