Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts

Steven C. Clay
Note

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O body swayed to music, O brightening glance,
How can we know the dancer from the dance?

—William Butler Yeats

As part of a print advertising campaign for Samsung Electronics America, Inc., David Deutsch Associates, Inc. created an advertisement parodying the popular game show “Wheel of Fortune.” The advertisement featured a mechanical robot on a mock “Wheel of Fortune” set, clearly imitating Vanna White, the game show’s hostess and famed letter-turner. White, who did not consent to the ad, sued Samsung and Deutsch in federal district court for the Central District of California, alleging they had unlawfully appropriated her identity for commercial gain, thus violating her right of publicity. The district court

3. Vanna White serves as the program’s hostess and turns letters on a large illuminated board as they are called out by three contestants attempting to guess a hidden phrase. White also claps and cheers as the contestants spin the “Wheel of Fortune,” a large wheel with different cash amounts and prizes for the contestant guessing the correct phrase.
4. Defendants did not ask for White’s consent before running the ad. Appellant’s Brief at 25, White (No. 90-55340).
5. For the remainder of this Note, the two defendants will be referred to as “Samsung.”
6. 971 F.2d at 1396.
7. White sued under California Civil Code § 3344 (West 1994) (providing a codification of the right of publicity), the California common law right of publicity, and § 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125(a) (1988). White, 971 F.2d at 1396. The “right of publicity” has been defined as “the inherent right of every human being to control the commercial use of his or her identity.” J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1.1[A][1] (1994).
granted Samsung's motion for summary judgment, but the Ninth Circuit reversed in part and remanded, stating that White had established a cause of action under the California common law right of publicity.

The Ninth Circuit thus found that Samsung's use of an obviously fabricated depiction of White, posed on a television setting protected by a copyright not even her own, may have violated White's right of publicity. In doing so, the White court has "probably gone the farthest of any case in any court in the United States of America" in protecting celebrity publicity rights.

Yet, this rush to protect all aspects of celebrity identity has proceeded with little or no critical judicial analysis. The extreme result in White, in particular, impels an inquiry into the continued justification for the right of publicity, as well as that right's effect on popular culture.

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8. *White*, 971 F.2d at 1396.
9. *Id.*
10. *Id.* at 1396-97. On remand, the jury awarded White $403,000, split approximately two-thirds between her right of publicity and Lanham Act claims, respectively. Telephone Interview with John Genga, Vanna White's Attorney (Feb. 2, 1994). An action for punitive damages under the Lanham Act is pending. *White*, 971 F.2d at 1397.
12. Because of the enormous number of celebrities living and working in California, as well as the sheer volume of entertainment produced within California, California publicity law will have a great impact on the rights of artists, entertainers, and advertisers everywhere. See *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1518 (9th Cir. 1993) (Kozinski, J., dissenting from the order rejecting rehearing en banc) ("If a Wyoming resident creates an ad that features a California domiciliary's name or likeness, he'll be subject to California right of publicity law even if he's careful to keep the ad from being shown in California."). This Note will focus primarily on California right of publicity law, because it is the most developed and influential right of publicity law in the United States, but will deal with other jurisdictions where relevant.
This Note argues that the right of publicity as applied in *White* and other cases has far outgrown the limited rationales that support it and other intellectual property protections. Part I explores the right of publicity's development from the right of privacy, and how courts currently apply it. Part I also presents the Ninth Circuit's reasoning for extending publicity rights in *White* as an in-depth example of the right of publicity's expansion. Part II demonstrates that traditional justifications for the right of publicity are unpersuasive, and shows how the right of publicity strikes an unrealistic balance between celebrity rights and popular culture. Part II proposes a less expansive right of publicity that requires direct competition with a celebrity's primary income-earning potential. This new right may be called the "right of performance." This Note concludes that the expansive publicity rights exemplified by *White* threaten free expression and artistic development and unduly intrude upon the public domain of popular culture.

I. EVOLUTION OF THE RIGHT OF PUBLICITY

A. THE RIGHT OF PRIVACY

The right of publicity is rooted in privacy doctrine that began to develop towards the end of the nineteenth century. This right of privacy can be succinctly stated as the right "to be let alone." Courts soon extended this right to protect private persons from unwanted publicity.

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14. Direct competition with a celebrity's primary income-earning potential refers to situations such as a celebrity imitator passing himself off as a particular celebrity for commercial gain.

15. This "right of performance" has been differentiated from the right of publicity by Madow, *supra* note 13, at 209 n.395. Madow, however, did not propose the right of performance as a complete replacement for the right of publicity. This Note attempts to flesh out this doctrine, demonstrating how it differs from the right of publicity and how courts might apply it.

16. A legal right to privacy was first proposed by Samuel D. Warren and Louise D. Brandeis in an article that is widely recognized as one of the most influential ever written. Samuel D. Warren & Louise D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); see also McCarthy, *supra* note 7, §§ 1.2-1.8, at 1-7 to 1-36 (tracing the right of privacy from Roman law onward); Madow, *supra* note 13, at 167-72 (discussing early privacy cases).


An inchoate right of publicity is apparent in early courts' attempts to apply the right of privacy to celebrities. Some courts were reluctant to apply privacy rights to celebrities, stating that celebrities waived any right "to be let alone" through their active pursuit of and profit from fame. Under this view, commerce in celebrities' identities was limited to payment to the celebrity for a waiver by the celebrity of the right to sue any licensee of the celebrity's identity for violation of privacy rights. If celebrities possessed no privacy rights, waiver

19. See, e.g., O'Brien v. Pabst Sales Co., 124 F.2d 167, 169 (5th Cir. 1941) (finding the publication of a football player's photograph was authorized by his college's publicity department), cert. denied, 315 U.S. 823 (1942); Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004, 1009 (W.D. Okla. 1938) (holding that although Ohio law may recognize a right of privacy, it does not extend to prominent, notorious, or well known persons), rev'd on other grounds, 106 F.2d 229 (10th Cir. 1939); Martin v. F.I.Y. Theatre Co., 26 Ohio Law Abs. 67, 69 (C.P. 1938); cf. Chaplin v. Amador, 93 Cal. App. 358, 360 (1928) (holding Charlie Chaplin allowed to enjoin look-alike actor from performing under the name "Charlie Aplin" on unfair competition grounds); Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 137 (1907) (holding famous inventor allowed to enjoin use of phrase "I certify that this preparation is compounded according to the formula devised and used by myself. Thos. A. Edison" on medicine bottle on false endorsement grounds).

20. In O'Brien, 124 F.2d at 170, a college football player was denied recovery under the right of privacy for a beer company's unauthorized inclusion of his picture on a promotional calendar, due to his active pursuit of fame. Dictum from this case, however, illustrates the nascent right of publicity:

The right of a person to recover on quantum meruit, for the use of his name in advertising [is not affected by this decision]. That was not the case pleaded and attempted to be brought. The case was not for the value of plaintiff's name in advertising a product but for damages by way of injury to him in using his name in advertising beer.

Id. It is unclear from which source the court derived this new right. The right of publicity's commercial possibilities can be traced as far back as Edison, also in dictum:

If a man's name be his own property, as no less an authority than the United States Supreme Court says it is, it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than the person seeking to make an unauthorized use of it.

73 N.J. Eq. at 137. Query that, if one is not entirely responsible for the pecuniary value of one's features, this value should be wholly vested in the owner. See infra part II (questioning traditional right of publicity rationales).

21. This doctrine was applied in Hanna Mfg. Co. v. Hillerich & Bradsby Co., 78 F.2d 763 (5th Cir. 1935). The plaintiff contracted with various professional baseball players for the exclusive use of their signatures on its baseball bats. Id. at 764. The plaintiff alleged that the defendant used the players' names on its own bats. Id. Although expressing some doubt as to whether baseball players in the public eye had any right to privacy at all, see O'Brien, 124 F.2d at 167-70, the court held that all the plaintiff gained from the agreement was a waiver preventing the players from objecting to the plaintiff's use of the signatures. Id. at 766. Thus, plaintiff could not enforce the players' rights
of any privacy-based cause of action possessed dubious value at best.\textsuperscript{22}

The first case to explicitly recognize that a celebrity's name or likeness has value beyond a right of privacy was \textit{Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.},\textsuperscript{23} a case involving baseball players who licensed their statistics and images for use on baseball cards.\textsuperscript{24} In coining the term "right of publicity," the court stated:

\begin{quote}
We think that, in addition to and independent of that right of privacy (which in 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.\textsuperscript{25}
\end{quote}

Although the court cited little authority or policy for its decision, \textit{Haelan Laboratories} stands as the underpinning of the right of publicity.\textsuperscript{26}
Two influential commentaries further developed the right of publicity. One commentator picked up the phrase "right of publicity" shortly after *Haelan* in a seminal article that solidified the right of publicity's existence as separate from the right of privacy. The late Professor Prosser, in a commentary universally cited in publicity cases, further delineated the difference between privacy and publicity rights. In so doing, Prosser categorized violation of publicity rights as one of four different torts constituting the invasion of privacy:

1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

It is the fourth of Prosser's torts, the appropriation of the plaintiff's name or likeness, that courts cite as the right of publicity.

This right in one's name or likeness is assignable, bestowing upon it substantial commercial value and rendering it enforceable by third parties. Many courts, however, have ruled that this right is not inheritable, making it an amalgam of

New York courts, as opposed to federal courts applying New York law, have consistently rejected a common law right of privacy or publicity. In 1984, the New York Court of Appeals unequivocally held that the decision in Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902), was still valid in Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 182 (1984), thus relegating any potential publicity or privacy plaintiffs to the statutory remedies offered by §§ 50-51 of the New York Civil Rights law, enacted as a response to Roberson in 1903. See *McCarthy*, supra note 7, §§ 6.9[A]-[C].

27. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (arguing that, although publicity and privacy claims sometimes overlapped, privacy plaintiffs were concerned with unwanted intrusions into their personal lives, while publicity plaintiffs complained of uncompensated exploitation of their identities, making privacy remedies inadequate).


29. *Id.* at 389. Prosser also avoided the debate over whether the right of publicity is "property," arguing it was "pointless." *Id.* at 406.


31. "Once protected by the law, [the right of publicity] is a right of value upon which the plaintiff can capitalize by selling licenses." *W. PAGE KEATON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 117, at 854 (5th ed. 1984).


33. *See, e.g.*, Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 958 (6th Cir.) ("The common law has not heretofore widely recognized this right to control commercial publicity as a property right which may be inherited.").
property and privacy rights. The exact property characteristics of the right of publicity remain unsettled in many jurisdictions today.

B. Justifications for the Right of Publicity

Following the first decisions recognizing the right of publicity, courts articulated a variety of reasons supporting this doctrine. Under what may be termed the "property rationale," courts frequently refer to the expenditure of time, effort, talent, and finances necessary to "become" famous. Celebrities have a moral claim under this justification to any money flowing from their fame, and those evoking this identity are free riders on the celebrity's gravy train. This moral claim derives from basic property theory: by exerting effort and creating something of value, the celebrity is entitled to its exclusive possession, just as a farmer is morally entitled to the produce of his or her field.
Anyone intruding upon this right is "reaping where [they] have not sown." 40

This justification is closely related to the economic incentive argument: the right of publicity provides an incentive to the population to undertake socially enriching activities. 41 The economic incentive argument is the ratio decidendi of the Supreme Court's only right of publicity case, Zacchini v. Scripps-Howard Broadcasting Co. 42 This argument is the same as that underlying copyright and patent law. 43

Another argument holds that unauthorized use of a celebrity's identity saturates the market, thus injuring the celebrity by reducing demand for his or her image. 44 This reasoning deems celebrities as commodities whose value will wither from overexposure. If celebrities lose control of their identity, a bar-

spill it in the sea . . . do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?" Id. This argument seems especially cogent in the right of publicity context, where a celebrity is in effect claiming to have spilled his or her can of tomato juice into the "sea" of popular culture.

40. McCARTHY, supra note 7, § 2.1[A], at 2-3. For another version of this phrase, see infra note 47.

41. See McCARTHY, supra note 7, § 2.2, at 2-9.

42. 433 U.S. 562, 576 (1976) ("Ohio's decision to protect petitioner'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."). But see Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir.) ("Fame often is fortuitous and fleeting. It always depends on the participation of the public in the creation of an image. It usually depends on the communication of information about the famous person by the media."), cert. denied, 449 U.S. 953 (1980); Madow, supra note 13, at 185-91 (describing the outside factors that allowed Einstein, rather than any other similarly brilliant physicist, to become this century's personification of genius).

43. In Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1983), the Court explained the rationale underlying intellectual property law as follows:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Id. at 429; see also Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964) ("Patents are not given as favors . . . but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention.").

44. See, e.g., Lahr v. Adell Chem. Co., 300 F.2d 256, 259 (1st Cir. 1962) ("It could well be found that defendant's conduct saturated plaintiff's audience to the point of curtailing his market. No performer has an unlimited demand.").
rage of commercials and other media exposure would quickly render that identity valueless.\footnote{45}

\section*{C. The Appropriation of "Identity" for Commercial Use: Applying the Right of Publicity Today}

Currently, twenty-four states recognize the right of publicity as common law or by statute.\footnote{46} Courts applying the right of publicity to unauthorized uses of a celebrity's identity distinguish between commercial and non-commercial use, and heavily disfavor commercial use.\footnote{47} The appropriation of identity for

\footnote{45. A corollary of this argument is that, without the right of publicity, celebrities would lose a substantial portion of their incomes. See Haelan Labs., Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953); supra notes 24-26 and accompanying text (finding an exclusive right of publicity to protect, among other things, a celebrity's pecuniary interest in his or her prominence). Without the right of publicity, advertisers and other commercial users would enjoy free access to a celebrity's identity, and there would be no reason to compensate the celebrities for its use.

46. McCarthy, supra note 7, § 6.2, at 6-6. The following states recognize the right of publicity as common law: California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin. Id. § 6.2, at 6-6 to 6-7. Four of these states also have statutes concurrently recognizing the right of publicity: California, CAL. CIV. CODE § 3344 (West 1994); Florida, FLA. STAT. ANN. § 540.08 (West 1988); Texas, TEX. PROP. CODE ANN. § 26.002 (West 1994); and Wisconsin, WIS. STAT. ANN. § 895.50 (West 1983). Nine states, although not explicitly recognizing the right of publicity as such, have privacy provisions sufficiently broad to encompass this right: Kentucky, KY. REV. STAT. ANN. § 391.170 (Michie/Bobbs-Merrill 1984); Massachusetts, MASS. GEN. LAWS ANN. ch. 214, § 3A (West 1986); Nebraska, NEB. REV. STAT. §§ 20-201 to 20-211, 25-840.01 (1991); Nevada, NEV. REV. STAT. ANN. §§ 597-790 (Michie 1993); New York, N.Y. CIV. RIGHTS LAW. §§ 50-51 (McKinney 1992); Oklahoma, OKLA. STAT. ANN. tit. 21, §§ 839.1-839.3 (West 1983); Rhode Island, R.I. GEN. LAWS § 9-1-28 (1985); Tennessee, TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (1988); and Virginia, VA. CODE ANN. §§ 8.01-40 (Michie 1992).

47. See, e.g., Carson v. Here's Johnny Portable Toilets, 698 F.2d 831, 835 (6th Cir. 1983) ("The right of publicity, as we have stated, is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity."); McCarthy, supra note 7, § 7.2[A], at 7-2; cf. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1983) (finding that under fair use copyright infringement test, commercial or profit-making uses are presumptively unfair). But see Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440, 446-47 (N.D. Ill. 1991) ("Although the primary purpose of most television commercials (like other works of a "commercial nature") may be to increase product sales and thereby increase income, it is not readily apparent that they are therefore devoid of any artistic merit or entertainment value."). The Supreme Court's reasoning in the "Gay Olympics" case, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 541 (1987), suggests that even commercial speech with expressive aspects is disfavored: "The mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose
commercial use constitutes the right of publicity’s heart, and has been phrased as receiving something “for which [the user] should normally pay.”

A developing aspect of the right of publicity is how to determine the extent to which a use must evoke or appropriate a celebrity’s identity before violating his or her right of publicity. The Prosser commentary originally proposed the tort as the appropriation of the celebrity’s “name or likeness,” and earlier courts held to this phrasing. Recent case law reflects an ex-

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48. See, e.g., McCarthy, supra note 7, § 7.2, at 7-6 (“The clearest case . . . of infringement of the Right of Publicity is the unpermitted use of personal identity in the advertising of goods or services.”).

49. Harry Kalven Jr., Privacy in Tort Law - Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 331 (1966). Some circularity is immediately apparent in making the law dependent on what usually requires payment in this field, because what usually requires payment is, of course, dependent upon the law.

50. One commentator has identified a trend towards protecting “all incidents of a person’s identity against wrongful commercial appropriation.” Heatherington, supra note 13, at 12.

51. Prosser, supra note 28, at 390; see also supra notes 28-29 and accompanying text (discussing Prosser’s seminal commentary on privacy and publicity rights).

52. See, e.g., Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 717 (9th Cir. 1970) (noting the strong federal policy of free competition in ideas not meriting or qualifying for patent protection); Davis v. Trans World Airlines, 297 F. Supp. 1145, 1145-47 (C.D. Cal. 1969) (“[I]mitation alone does not give rise to a cause of action.”). But see Lahr v. Adell Chem. Co., 300 F.2d 256, 259 (1st Cir. 1962) (upholding action for voice imitation, but under the guise of common law unfair competition and emphasizing the unique qualities of plaintiff’s voice (voice imitation was of a duck)).
pansion of publicity rights by the courts. Courts have expanded the right of publicity in two general ways: by broadening the traditional reading of "name" and "likeness" to include such things as nicknames, drawings, and celebrity look-alikes, or by going beyond the Prosser formulation of name and likeness (and many state statutes based on the Prosser elements) by including characteristics such as vocal idiosyncrasies within a more general formulation of "identity."

This second line of cases extending identity beyond the name or likeness formula may be divided into two further subcategories. The first sub-category encompasses cases extending identity based on some personal aspect of the celebrity being exploited. Personal aspect cases often involve individuals imitating a celebrity's voice or other characteristic. These cases

53. The expansion has been particularly evident in the Ninth Circuit Court of Appeals. See Kent, supra note 11.


55. See, e.g., CAL. CIV. CODE § 3344 (West 1994) (creating a cause of action for use of another's name, voice, signature, photograph, or likeness for advertising, selling, or solicitation purposes).

56. See, e.g., White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992) (criticizing any limit in the number or type of factors that comprise identity in the common law right of publicity), cert. denied, 113 S. Ct. 2443 (1993); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (expanding the attributes of identity to voice in the case of a famous singer); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974) (holding that the peculiar markings of a race car driver's automobile were within the scope of his protected identity).

57. E.g., Waits v. Frito-Lay Inc., 978 F.2d 1093, 1100 (9th Cir. 1992) (protecting a well-known singer's identity as embodied in his voice); Midler, 849 F.2d at 460 (noting that the human voice is one of the most identifiable traits of certain celebrities). For purposes of this analysis, a look-alike actor appropriating all aspects of a celebrity's identity will be categorized as a facet of the "likeness" cases. See supra note 54 and accompanying text (expanding the interpretation of "name" and "likeness" to include portraits, look-alikes, and noted nicknames; see also Allen, 610 F. Supp. at 612 (debating the question of whether picture of look-alike actor could constitute plaintiff's "likeness").

58. The Ninth Circuit, applying California law, has twice recently passed on the question of voice imitators: Midler, 849 F.2d at 460, and Waits, 978 F.2d...
present a particularly strong argument for the right of publicity, because a voice or other imitation may deprive the celebrity of direct income and entertainment opportunities by offering the advantage of the celebrity's recognition at a bargain price.59

59. The facts of Midler follow. Upon Bette Midler's refusal to sing an edited version of her song "Do You Want to Dance" in Ford's commercial, Ford's advertising agency sought out one of Midler's backup singers, and instructed her to "sound as much as possible like the Bette Midler record." 849 F.2d at 461. She was so successful that Midler sued. The court, in reversing a lower court grant of summary judgment, stated that Midler had a valid common law right of publicity action: "A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. . . . To impersonate her voice is to pirate her identity." Id. at 463. The court limited its new right only to "professional singer[s] [whose voice] is widely known and is deliberately imitated in order to sell a product." Id.

The Waits court applied the Midler decision to similar facts: a well-known singer, Tom Waits, was imitated after refusing to sing for a commercial. 978 F.2d at 1097-98. The Waits court expanded on the Midler holding by offering a "common sense" definition of the requirement that a voice must be "distinctive" for protection, id. at 1102, and stated that the imitation must be of something more than the performer's "style." Id. at 1101. The Waits court also let stand a lower court award of mental distress damages based on Waits' idealistic opposition to his music being used in commercials, id. at 1103, as opposed to the Midler court's award only of compensatory pecuniary damages.

59. The appropriation of a celebrity's performance value has been distinguished from a celebrity's commercial value by one commentator and termed the "right of performance." Madow, supra note 13, at 208 n.395.

An analogy to fair use parody doctrine is illustrative of the difference between the right of publicity and the right of performance. In parody, one dispositive question is whether the parody fulfills the demand for the original work. If so, it is directly competing with the original and not a "fair use" under copyright law. See Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1176 (1994); Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986); see also Beth Warnken Van Hecke, Note, But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use, 77 MINN. L. REV. 465, 486-87 (1992) (arguing that whether a parody is a fair use should depend entirely on whether the parody is capable of serving as a substitute for the original work). Analogously, a mimic may be seen as fulfilling the demand for the original performer, thus infringing on his right of performance. By fulfilling this demand, the mimic is infringing on the performer's direct commercial opportunities, rather than the collateral rights protected by the right of publicity.

The Supreme Court's only true right of publicity decision, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1976), is best viewed as a right of performance decision, although of a variety not involving a mimic. In this case, a "human cannonball" performer noticed a reporter at his performance, and asked him not to film it. The reporter filmed the entire 15-second sequence of the performer being shot from a cannon, which was broadcast in its entirety on the local evening news, albeit with favorable comment encouraging viewers to see the performance. Id. at 563-64. The Court stated,

[T]he broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus, in this case, Ohio has
The second sub-category consists of cases that extend identity based on the "trappings" that surround and enforce a celebrity's identity, the "penumbras" of identity. This sub-category of identity cases extends the right of publicity to cover various indicia of identity not involving a plaintiff's personal characteristics. These cases hold that the touchstone of a right of publicity violation is that the plaintiff's identity be "evoked" for a commercial use. This evocation of identity does not rely upon

recognized what may be the strongest case for a "right of publicity"—involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.

Id. at 576.

60. E.g., White, 971 F.2d at 1395; Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983); Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 664 (1977).

61. See supra note 57 (examining a celebrity's right to performance).

62. An early Ninth Circuit case, Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974), extended a famous race car driver's identity to cover his distinctly-marked race car. Defendant tobacco company used footage of this distinctive car, with some markings slightly changed, in a television commercial without permission. Id. at 824. Although plaintiff was driving the car, his features were not visible. Id. at 827. In reversing a lower court summary judgment ruling, the court held that the totality of circumstances made it clear that viewers would likely infer that plaintiff was driving the car due to its distinctiveness. Id. at 827. Although one commentator has described this case as the "most radical extension of [identity] protection," Heatherington, supra note 13, at 10, it actually seems to be only an incremental step, as it is clear the commercial's implication was that plaintiff was driving the car and thus endorsing the product.

This implication is absent from two further extensions of the identity concept, Lombardo, 396 N.Y.S.2d at 661, and Carson, 698 F.2d at 831. In Lombardo, well-known New Year's Eve personality Guy Lombardo sued for infringement of his identity as "Mr. New Year's Eve." 396 N.Y.S.2d at 664. The defendant's offending car commercial featured "a New Year's Eve party with all the usual trappings, including services of an actor conducting a band and utilizing the same gestures, musical beat and choice of music with which plaintiff had become associated in the public mind." Id. at 662. The music in question was "Auld Lang Syne," which in conjunction with balloons and party hats "might amount to an exploitation of that carefully and painstakingly built public personality." Id. at 664. There is no mention in the opinion about whether the commercial was deceiving, or that the actor was mimicking Guy Lombardo in a way likely to convince viewers that it actually was Guy Lombardo. Rather, the mere presence of the "trappings" of a New Year's Eve party, with which Guy Lombardo's public personality was associated, was enough in this court's eyes to constitute a valid cause of action.

The facts of Here's Johnny are somewhat similar. In this case, a toilet company marketed "Here's Johnny" portable toilets in a takeoff on the phrase used to introduce Carson as the host of "The Tonight Show." Carson, 698 F.2d at 832-33. The company also used the slogan "The World's Foremost Comedian" to market the toilets. 698 F.2d at 833. The court reversed a lower court dismis-
a realistic rendering of the plaintiff; rather, the evocation must somehow remind the audience of the plaintiff. This is accomplished through use of those surroundings of celebrity identity that reinforce the celebrity's semiotic message, thus reinforcing who the celebrity is to the audience.

D. **White**: Current Right of Publicity Doctrine's Outer Limits

*White* provides a clear picture of current right of publicity doctrine. Although *White* touches upon each category of cases extending identity beyond the name or likeness formula, *White* most clearly fits within the celebrity-trappings genre. *White* represents the farthest extension yet of celebrity identity, clearly continuing the trend of protecting all indicia of celebrity.

The Ninth Circuit sustained White's cause of action under the California common law right of publicity. The court held sal of Carson's suit, holding that, even though the phrase did not identify Carson, use his likeness or any aspect of his personality, or imply that Carson endorsed or had any association with the product, it nonetheless appropriated his identity. *Id.* The court stated, "We believe that...[this] conception of the right of publicity is too narrow." *Id.* at 835.

Thus, both New Year's Eve and a phrase used to introduce a celebrity are privatized as aspects of celebrity identity. It is not known by the author whether the phrase "Here's Johnny" has been copyrighted by the producers or owners of the program, but this adds an interesting twist to the right of publicity that will be discussed in light of the *White* case in part II, infra. Cf. Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 674 (7th Cir. 1986) (holding that baseball players' right of publicity interest in their televised baseball performances is subsumed by baseball team owners' copyright protection in the same televised performances, and is thus preempted by federal law), cert. denied, 480 U.S. 941 (1987).

63. The *White* court dismissed the proposition that some characteristic of the plaintiff actually be realistically represented as "merely challenging" the clever advertising strategist to come up with a new way to "eviscerate" celebrities' rights. *White*, 971 F.2d at 1398-99.

64. This would include the setting upon which the celebrity usually performs, the phrase generally used to introduce the celebrity, or a costume associated with the celebrity's public role.

65. *See supra* notes 60-64 and accompanying text (discussing the extension of identity to include all factors that tend to remind the audience of the celebrity).

66. *See supra* note 50 (acknowledging the expansion of protected identity to virtually all traits as references of celebrity).

67. 971 F.2d at 1399. White alleged three distinct causes of action: California Civil Code § 3344 (West 1994), the California common law right of publicity, and § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988) (establishing a cause of action for using false descriptions or representations of a celebrity that tend to confuse the audience over whether that celebrity has endorsed a prod-
that a prior statement of the elements necessary to plead a right of publicity cause of action, under which White's cause of action would have been insufficient, was not meant to be exclusive. The court stated that the "name or likeness" element was merely an account of the prior cases recognizing the right of publicity, and stemmed from the early Prosser formulation of the right. Expanding upon Prosser's role in forming the right of publicity, the court noted that Prosser himself had observed that cases involving actions beyond appropriation of a name or likeness might one day emerge.

Section 3344(a) of the California Civil Code provides, in pertinent part, that "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, ... for purposes of advertising or selling, ... without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof." CAL. CIV. CODE § 3344 (West 1994). Section 3344's plain language presented an enormous hurdle for White, who sued for damages for the use of a clearly mechanical robot in an advertisement. As the statute limited recovery to the use of a celebrity's name or likeness, and the robot did not in any way resemble White, 971 F.2d at 1397, the court gave White's § 3344 claim short shrift and affirmed the lower court's dismissal. The court stated: "Without deciding for all purposes when a caricature or impressionistic resemblance might become a 'likeness,' we agree with the district court that the robot at issue here was not White's 'likeness' within the meaning of section 3344." This clearly cements White's position outside the "likeness" line of cases. See supra notes 54-64 and accompanying text (describing likeness cases).

68. Eastwood v. Superior Ct., 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1984). The elements are, "(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." Id. (citation omitted).

69. The White court seized upon the Eastwood court's statement that infringement of the right of publicity "may be alleged" by pleading the elements listed in note 68, supra. 971 F.2d at 1397 (citing Eastwood, 198 Cal. Rptr. at 342) (emphasis added).

70. See supra note 68 (listing the four elements of infringement of the right of publicity).

71. White, 971 F.2d at 1397.

72. "It is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness, and that this would be an invasion of his right of privacy." 971 F.2d at 1397-98 (quoting Prosser, supra note 28, at 401 n.155). Prosser gives the example of impersonation, recognized in prior Ninth Circuit decisions. This statement is in line with the cases recognizing imitation or use of some personal aspect of the plaintiff, but does not seem to endorse the "trappings" genre of cases. See supra notes 60-64 and accompanying text (discussing cases extending identity based on "trappings" surrounding and enforcing a celebrity's identity).
The court buttressed its reasoning by synthesizing two previous federal cases, one from the Ninth Circuit\textsuperscript{73} and the other from the Sixth Circuit\textsuperscript{74}:

These cases teach not only that the common law right of publicity reaches means of appropriation other than name or likeness, but that the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity. The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable.\textsuperscript{75}

The court reasoned that the "means" used to accomplish the identity appropriation were not important, just the appropriation itself.\textsuperscript{76} Making the manner of appropriation dispositive, the court said, would "eviscerate" the right of publicity.\textsuperscript{77}

An important aspect of this case is Samsung's First Amendment defense. Samsung argued that the First Amendment protects the commercial as a parody of Vanna White.\textsuperscript{78} The court summarily dealt with this argument in one paragraph, stating that commercial speech cannot qualify for the parody defense.\textsuperscript{79}

\textsuperscript{73} Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); see supra note 62 and accompanying text (discussing Motschenbacher and other cases extending the identity concept).

\textsuperscript{74} Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983); see supra note 62 and accompanying text (discussing Here's Johnny and how Carson's identity had been appropriated).

\textsuperscript{75} 971 F.2d at 1398. The court noted that neither case involved use of the plaintiff's name or likeness, and further reasoned that in Motschenbacher "the driver could have been an actor or dummy and the analysis would have been the same." \textit{Id.}

\textsuperscript{76} \textit{Id.} at 1399.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.} at 1401. Parody, a defense available under the fair use doctrine, codified at 17 U.S.C. § 107 (1988), is generally applied in copyright infringement cases. \textit{See supra} note 59 and accompanying text (discussing fair use parody doctrine and the difference between right of publicity and right of performance). It is perhaps indicative of this case's reach that the defense is being applied against a person not capable of holding a copyright in what is being infringed. \textit{See} Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986). Samsung cited Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 99 (1988), and L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987), to support its defense. Brief for Appellee at 17, \textit{White} (No. 90-55840). For further discussion of the parody defense, see Van Hecke, \textit{supra} note 59 at 486-87.

\textsuperscript{79} Although noting that celebrity identity can be invoked for "expressive" purposes, the court stated that any expressive content in the ad is "only tangentially related to the ad's primary message: 'buy Samsung VCRs.'" \textit{White}, 971 F.2d at 1401.

The test for whether so-called "commercial speech" qualifies for First Amendment protection is found in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980). \textit{White} does not attempt to apply the
The court concludes, "[t]he difference between a 'parody' and a 'knock-off' is the difference between fun and profit." 80

II. CELEBRITY RIGHTS AT THE PUBLIC'S EXPENSE: A CRITICAL ANALYSIS OF THE RIGHT OF PUBLICITY

White continues a long line of precedent supporting a celebrity's right to control the use of his or her image in society without analyzing the conclusory reasons behind such a right, or taking into account the costs such a right may impose upon popular culture. Courts have failed to analyze the traditional rationales cited for the right of publicity. 81 Furthermore, these courts have not harmonized right of publicity protection with traditional intellectual property law, and have failed to take into account the nature of the relationship between celebrity and audience. 82 In place of the current right of publicity, courts should establish a relatively narrow right that protects the celebrity only from infringement upon the celebrity's performance identity. 83

A. THE RIGHT OF PUBLICITY HAS OUTGROWN ITS LIMITED RATIONALES

1. Traditional Right of Publicity Justifications Are Unpersuasive

The argument that one becomes famous only through enormous expenditures of time, talent, energy, finances, and other resources, the "property" or "moral" rationale, is not always accurate. 84 With few exceptions, however, courts do not challenge these assertions. 85

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80. White, 971 F.2d at 1401. This so-called "difference between fun and profit" and the distinctions that may truly be drawn between commercial and non-commercial speech will be dealt with in part II, infra.

81. For an explanation of these rationales, see supra notes 36-45 and accompanying text.

82. The so-called "cult of celebrity" is, after all, merely another form of pop-art in today's society. This concept will be further developed infra.

83. See supra note 59 and accompanying text (distinguishing between the rights of publicity and performance).

84. For an explanation of the property rationale, see supra notes 38-40 and accompanying text.

85. See Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980); supra note 42 (challenging the notion that fame is due to a celebrity's hard work).
Certainly, many celebrities have worked very hard to achieve their position. The property rationale, however, ignores two factors: first, many unknown entertainers expend similar resources developing abilities that are equal to or better than those of celebrities, and never receive the compensation this exclusive right bestows only on those already famous. More importantly, the property rationale fails to account for the serendipitous and unpredictable influence of the public and media on who becomes a celebrity. A celebrity's hard work alone is not enough; somehow the media must pick up on the image and disseminate it, and the celebrity must somehow appeal to the vagaries of public taste at that moment. Any rights created through this process should thus belong to the public, at least in proportion to their contribution, and a complete privatization of these rights is actually an infringement upon the public's moral rights.

The public's role in the image-making process is woefully underemphasized by courts. In the end, it is the public that determines a celebrity's role and image in our popular culture, guided to some extent by the media and the "star-making" industry. Public choice may destroy or make irrelevant even the most carefully maintained image. Additionally, the most undeserving personalities can be thrust into the national spotlight,

86. Compare the time practicing, resources spent on lessons, schooling, instruments, and other equipment, and financial sacrifices necessary to become a classical cellist with the Hollywood romance of the young star being "discovered" in a diner.

87. A corollary argument is that, given the influence of agents, publicists, producers, script writers, and other tools of the star-making machine, many or even most celebrities are not the ones performing whatever hard work does go into making their image.

88. The case of the "Where's the beef" woman, Clara Peller, is illustrative. "Peller became a household name and face by virtue of her 'Where's the beef' series of commercials for Wendy's Old Fashioned Hamburgers in the early 1980s." Heatherington, supra note 13, at 26 n.163. The Wendy's commercials featuring the formerly obscure senior citizen went so far as to "influence the 1984 Democratic nomination process." Id. Former Vice President Walter Mondale challenged nomination rival Gary Hart's platform of "new ideas" by demanding to know "Where's the beef?", the phrase made famous by Peller. This further exposure of the curmudgeony Peller and her famous catch-phrase cemented Peller and "Where's the beef" in the public mind and our political history. Id. (supporting the right of publicity).

Whatever Peller's talents may be, and whether these commercials fully displayed them, it is clear that, of all the factors contributing to Peller's fame, her talents are the least noteworthy. It rather seems, as is so often the case, that she was in the right place at the right time.

89. E.g., rap star Vanilla Ice, who burst onto the music scene and sold millions of records, but quickly became a national joke.
with resulting endorsement revenues.\textsuperscript{90} To take proper account of these factors, courts allocating publicity rights based upon a property rationale would seemingly have to divide these rights between celebrities, the public, and the media on a case-by-case basis.\textsuperscript{91} Courts, however, see only the supposed contributions to fame of celebrity plaintiffs, ignoring the public's influence and resulting moral rights.\textsuperscript{92}

As it stands, the right of publicity is almost entirely a celebrity doctrine.\textsuperscript{93} Obviously, the only names, likenesses, and other factors of identity that have a market value worth protecting are those that are already known.\textsuperscript{94} The right of publicity thus serves to concentrate control of celebrity identity with the celebrity, and does not contribute to the development of any new or

\textsuperscript{90} E.g., Jessica Hahn, thrust into tabloids, music videos, and magazines for her much-publicized affair with a popular televangelist. Examples from today's headlines would include California's Menendez brothers and Tonya Harding.

\textsuperscript{91} In an interview predating her right of publicity litigation, Vanna White stated:

\begin{quote}
I think the reason I'm getting so much attention is, first, the show is so popular\. .\. I've never really spoken about this, and I'm trying to figure it out myself. I don't know why this has happened to me. I work hard and I'm dedicated, but overall I'm totally surprised. What did I do to deserve this? I count my blessings all the time, but in five years, ten years, who's Vanna White?
\end{quote}

Dan Hurley, \textit{The End of Celebrity}, \textit{Psychol. Today}, Dec. 1988, at 55. White is befuddled by her own celebrity; ignoring all the reasons cited by courts in right of publicity cases, she instead attributes it to "Wheel of Fortune's" popularity and her own good luck.

92. The \textit{White} court has taken this one step further. Rather than worry about a moral justification for the right of publicity, the court states, "The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof." \textit{White v. Samsung Elec. Am., Inc.}, 971 F.2d 1395, 1399 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993).

93. \textit{See, e.g.,} Appellant's Reply Brief at 10, \textit{White} (No. 90-55840) ("It is precisely Ms. White's celebrity status, however, that the law is designed to protect."); \textit{see also} Madow, \textit{supra} note 13, at 174 (describing Melville Nimmer's seminal article, \textit{see supra} note 27, as "a high-class form of special-interest pleading for the star image industry").

94. It is because celebrities are known quantities to the public that advertisers and other potential users wish to associate with or otherwise build upon celebrity identity. It is the identity's semiotic, message-bearing power that is being exploited. If the public does not recognize the image, there is nothing with which to carry the user's message.
different meaning or culture through that identity.  This may be called a "privatization" of popular culture.  

The market saturation justification similarly does not withstand analysis. This rationale is crucial to proving damages in some right of publicity cases. Once again, courts cite this argument in a conclusory manner, without determining whether a market is actually being, or even capable of being, saturated.  

95. This is because once an identity has become valuable, a celebrity will vigorously resist any use that would tend to diminish that value. By granting control of one's identity to the celebrity, the right of publicity artificially freezes the identity's development. This will be discussed further through the concept of "preferred meaning," infra.  

96. This concept is analogous to the result of a Supreme Court decision, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987), where the United States Olympic Committee sued a San Francisco organization to enjoin the organization from promoting an event known as the "Gay Olympics." Rather than conventional trademark protection, which requires the likelihood of confusion on the part of consumers, see 15 U.S.C. § 1114(a) (1988), the USOC relied on a specific grant from Congress in the Amateur Sports Act, 46 U.S.C. § 380 (1988), of near exclusive commercial use of the word "Olympic." 483 U.S. at 526. The Court held, "Congress intended to provide the USOC with exclusive control of the use of the word 'Olympic' without regard to whether an unauthorized use of the word tends to cause confusion." Id. at 530. The court further stated that allowing traditional trademark defenses in this case would render the Amateur Sports Act "superfluous." Id.  

In language making the right of publicity analogy even more apparent, the court stated, "It is clear that the SFAA sought to exploit the 'commercial magnetism' of the word given value by the USOC." Id. at 539 (citation omitted). Thus, the case can be said to stand for the proposition that Congress has the power to take a word "off the market," just as the right of publicity can be said to privatize a celebrity's development of his or her own image.  

97. See supra notes 44-45 and accompanying text (discussing the market saturation justification).  

98. See, e.g., Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (sustaining a market saturation award based on expert witness testimony); Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962) (arguing that a plaintiff's market may be curtailed by a defendant's conduct tending to saturate that market). Waits presents an especially interesting market analysis situation. First, the court affirmed a jury award to Waits for injury to "peace, happiness and feelings," 978 F.2d at 1103, because commercial endorsements were "particularly offensive to Waits." Id. The court then proceeded to state that "if Waits ever wanted to do a commercial in the future, the fee he could command would be lowered by $50,000 to $150,000 because of the Doritos commercial." Id. at 1104. The court thus sustained a market saturation award of $75,000 to Waits, based on expert witness testimony. Id.  

99. See, e.g., Hirsch v. S.C. Johnson & Sons, Inc., 280 N.W.2d 129, 138 (Wis. 1979) ("The economic damage caused by unauthorized commercial use of a name [may include] the dilution of the value of the name in authorized advertising."); see also McCarthy, supra note 7, § 11.8(B), at 11-43 to 11-47 (outlining the market saturation rationale and citing cases). From a common-sense perspective, it would appear that awarding specific damages based on a celebrity's future market is speculative at best, due to our popular culture's
Related to this argument is the underlying assumption that eliminating the right of publicity would deprive celebrities of a substantial amount of money. This argument, however, assumes that only the law's protection imbues a celebrity's image with value. Although portions of a celebrity's identity would become available for use by artists and entertainers absent legal protection, the celebrity himself could still command substantial endorsement power. After all, the raison d'être for a "celebrity endorsement" is, in fact, the celebrity's endorsement. Large advertisers would continue to pay substantial endorsement money to have celebrities actually endorse or use their products, as well as act in their commercials.

The economic incentive argument also fails in the real world. To say that the right of publicity is necessary to encourage people to became famous athletes or entertainers is to completely ignore the primary rewards gained by one who has become famous and to set up the collateral rewards as the primary motivation. Those who posit the incentive argument would have us believe that the million dollar salary of an NBA draft pick (or other entertainer) is not enough to ensure an ade-

mercurial nature. Additionally, a market's capacity for saturation would appear to differ with each celebrity, rendering it difficult to lay down any concrete principles for determining when a market could be saturated.

100. See Madow, supra note 13, at 208-211; see also supra note 45 and accompanying text (discussing how free access to a celebrity's identity destroys its value).

101. For example, even without a right of publicity Michael Jordan would still be in demand to dunk basketballs on television, his recent retirement notwithstanding. A commercial such as Jordan's Superbowl Sunday extravaganza with Bugs Bunny would not be possible without Jordan's consent and active participation, whatever the status of right of publicity law. Moreover, even without a right of publicity advertisers would be prevented by false advertising law from misleading consumers that a recalcitrant celebrity endorses their product. See, e.g., McCarthy, supra note 7, § 5.4[A], at 5-24 n.1.2 ("Where there is no false endorsement, it is an exercise in futility to try to cram the claim for legal recovery into false advertising law . . . .").

102. See supra notes 41-43 and accompanying text (discussing whether economic incentives drive creation of celebrity images).

103. As the Sixth Circuit once stated,

Although fame and stardom may be ends in themselves, they are normally by-products of one's activities and personal attributes, as well as luck and promotion. The basic motivations are the desire to achieve success or excellence in a chosen field, the desire to contribute to the happiness or improvement of one's fellows and the desire to receive the psychic and financial rewards of achievement.

quate flow of talent into this field. This argument assumes that only the addition of the shoe endorsement contract will attract the correct mix of ability.\textsuperscript{104}

2. Celebrity Protections Stifle Cultural Growth and Contradict Traditional Intellectual Property Law

Protecting celebrity images may actually stifle real cultural growth. Although constituting only an indirect source of income to those already famous,\textsuperscript{105} exploitation of celebrity identity\textsuperscript{106} constitutes a direct source of revenue to such entertainers and artists as satirists, cartoonists, comedians, and advertisers,\textsuperscript{107} among others. The right of publicity discourages these artists while failing to provide additional incentive to celebrities,\textsuperscript{108} directly contravening the policy behind intellectual property law of stimulating creative output.\textsuperscript{109}

Additionally, the right of publicity elevates private benefits to the exclusion of public rights, further contradicting traditional intellectual property law.\textsuperscript{110} Implicit in other intellectual property protections is the notion that the rights exist to serve

\textsuperscript{104} The elimination of any economic incentive may operate on the margins to deter entry into any particular field. The right of publicity, however, is the exclusive domain of the elite and powerful few. Only those already commanding millions of dollars in direct income are likely to attract even minimal opportunities for celebrity endorsement. Thus, the disincentive on those not already famous is indirect, and likely de minimis. Also, it may be that, particularly in the case of athletics, there is an oversupply of talent attempting to occupy a very small number of positions in the public eye, to the exclusion of other, more socially rewarding pursuits. See Madow, \textit{supra} note 13, at 216-17 (discussing whether the rewards of celebrity draw too much effort and aspiration into fields where only a few can succeed).

\textsuperscript{105} See \textit{supra} notes 102-104 and accompanying text (arguing that only those commanding millions of dollars in direct income are likely to attract even minimal opportunities for celebrity endorsements).

\textsuperscript{106} Exploitation of celebrity identity is a crucial element of today's popular culture.

\textsuperscript{107} The commercial/non-commercial speech distinction will be dealt with \textit{infra}.

\textsuperscript{108} In other words, the celebrity's creative output will probably not be affected by endorsement revenues. Rather, it will be attached to economic rewards flowing directly from creative pursuits. It may even be posited that the right of publicity allows celebrities to rest on their laurels while feeding off of publicity revenues, thus directly discouraging further creative output.

\textsuperscript{109} See \textit{supra} notes 41-43 and accompanying text (discussing the policy behind intellectual property law). Under federal copyright and patent law, a comprehensive scheme is already in place to protect the same incentives supposedly protected by the right of publicity.

\textsuperscript{110} See \textit{supra} notes 41-43 and accompanying text (discussing the fortuitousness of fame and the rationale underlying intellectual property law).
the public, and that the public eventually will control its products. The right of publicity, however, attempts to hold celebrity image from the public domain for as long as possible, yielding only to public influence with the utmost reluctance.

Furthermore, cultural development that opposes prevalent beliefs is exactly the type of cultural development we should encourage. Artists and others who exploit celebrity identities are likely to challenge the "preferred meanings" of these identities. Celebrities, by contrast, attempt to preserve the status quo and thus their own incomes to cultural development's detriment. The Samsung advertisement can be seen in this light as a satirization of White and the entire modern process of becoming a celebrity. By replacing White with a robot, it comments on the interchangeable, generic, talentless nature of celebrity in general and possibly Vanna White in particular. The joke behind the ad is the implication that Vanna White can be replaced with a robot. Requiring permission for this type of use would effectively eliminate this critical comment from our culture, because White and other celebrities are not likely to allow unsympathetic uses of their identities. Requiring the sati-

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111. See supra note 41-45 and accompanying text (discussing the rationale underlying intellectual property law).

112. For instance, the governor of Minnesota recently signed into law a bill banning the sale of "Crazy Horse Malt Liquor," an alcoholic beverage named after the late 19th century Lakota leader. Gov. Bans Crazy Horse Malt Liquor, USA Today, Int'l Edition, May 12, 1994, at 8B. Crazy Horse has been dead for over a century, but his image is still vigilantly protected against offensive meanings. Id.

113. See infra note 138 and accompanying text (discussing preferred meaning).

114. See supra notes 105-109 and accompanying text (arguing that celebrities rest on their laurels while feeding off publicity revenues).

115. A recent exhibition at the Minneapolis Institute of Arts provides a trenchant example of artistic use of a celebrity's identity. Kira Obolensky, Nightmare at the Helmsley Palace, Art, Dec. 1992, at 8-10. This exhibit consisted entirely of photographer Judith Yourman's photographs and multimedia representations of hotel magnate and infamous celebrity tax evader Leona Helmsley. Id. The exhibits, ranging from Helmsley depicted in surreal colors and situations to black and white video of Helmsley at trial, combined to create a unique comment upon one element of our society. Id. The exhibit also highlighted the sensationalistic nature of media coverage and its relationship to the legal system through representations of Helmsley's trial and the media coverage it generated, implicating our legal system as just another element of the popular culture. Id. Clearly, Helmsley would not have given her permission for this if required, and our culture would be damaged.

116. White has been called "one of the more inexplicable celebrities in the history of fame." Hurley, supra note 91, at 50.
rist to use White herself in the ad is similarly unsatisfactory, because it totally destroys any satirical effect.\footnote{117}

3. The Right of Publicity Contradicts Copyright Law

Conspicuously absent from right of publicity law is any "fair use" doctrine modeled after copyright law.\footnote{118} Recognizing that cultural development is a linear process building upon the work of those who have come before,\footnote{119} Congress and the courts have created fair use as a limitation on intellectual property protection. This limitation allows socially desirable uses of otherwise protected ideas. The fair use exception recognizes that absolute protection of ideas is actually contrary to copyright law's purpose.\footnote{120}

The fact that \textit{White} is based on the "trappings of celebrity" line of cases\footnote{121} raises additional problems with copyright law. None of the identifying aspects cited by the court is personal to Vanna White.\footnote{122} The court cites the mock "Wheel of Fortune"
set itself as the dispositive factor identifying the robot as Vanna White. Vanna White's property right in this trapping of her identity, however, is actually the "Wheel of Fortune" owner's copyrighted intellectual property.

Vanna White is thus suing under a cause of action based on appropriation of someone else's federally copyrighted property. Although this would not seemingly run afoul of federal preemption doctrine, it does interfere with rights protected by the federal copyright scheme.

White and other "trappings" cases are additionally vulnerable because the trappings used to evoke the celebrity's identity may not exclusively identify one celebrity, particularly if the trappings are another person's protected intellectual property. For example, after reciting the copyrighted factors in the ad that bring Vanna White to mind, the court stated that

dresses like this at times, but so do many other women. The robot is in the process of turning a block letter on a game-board. Vanna White dresses like this while turning letters on a game-board but perhaps similarly-attired Scrabble-playing women do this as well. The robot is standing on what looks like the Wheel of Fortune game show set. Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one. Indeed, defendants themselves referred to their ad as the "Vanna White" ad. We are not surprised.

971 F.2d at 1399.

123. See supra notes 60-64 (discussing the "trappings of celebrity" line of cases). Minus this factor, none of the other characteristics cited by the court would identify the robot as Vanna White. Even without the other factors, however, anyone posed on the set of "Wheel of Fortune" turning a letter would remind the viewer of Vanna White.  

124. See, e.g., Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 677 (7th Cir. 1986) (holding that players' rights to publicity are within the subject matter of copyright and so are preempted by federal law). The principal distinction is that the baseball players in this case were suing for publicity rights in their televised performances in copyrighted baseball games, whereas Vanna White is suing for performance rights outside of the specific "Wheel of Fortune" broadcast, although based on material contained within that broadcast.

125. See White, 989 F.2d at 1518 (Kozinski, J., dissenting to denial of rehearing en bano) ("In a case where the copyright owner isn't even a party—where no one has the interests of copyright holders at heart—the majority creates a rule that greatly diminishes the rights of copyright holders in this circuit."). For a discussion of federal preemption doctrine as applied to the right of publicity in general, see Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1099-1100 (9th Cir. 1992) (holding that right of publicity is not preempted). It is worth noting, however, that Waits, as contrasted with White, did not involve a suit on identity aspects protected under federal copyright law. Id.

126. See supra note 60-64 and accompanying text (discussing the "trappings" advertisers use to evoke images of particular celebrities).
she is the "only" person thus identified.\textsuperscript{127} Vanna White, however, may be replaced.\textsuperscript{128} If the show's owners/producers replace Vanna White with another letter-turner, the newly-created celebrity would assume White's position and responsibilities on the program. This person would enjoy all the benefits gained from White's efforts and talents, as well as all the "trappings" noted by the court as identifying White in the ad.\textsuperscript{129} In other words, the new letter-turner is a "free rider" and "reaping where others have sown."\textsuperscript{130} If this new letter-turner were to exploit this serendipitous fame in commercials, posing on "Wheel of Fortune"s" set,\textsuperscript{131} she would violate White's right of publicity as stated by the Ninth Circuit. It is equally clear, however, that the right of publicity should not be construed so as to give a celebrity total control over a certain genre of roles,\textsuperscript{132} or to constrain copyright holders in how they dispose of copyrighted material. \textit{White}, as this example demonstrates, lends itself to such an untenable expansion.\textsuperscript{133}

\textsuperscript{127} 971 F.2d at 1399.
\textsuperscript{128} Relatedly, White is also not the show's original hostess; this honor belongs to Susan Stafford, who hosted the show from its premier on January 6, 1975, until the fall of 1982. Appellee's Brief at 3, \textit{White} (No. 90-55840). The subsequent analysis in the text would also apply to Stafford were she to perform endorsements on a mock "Wheel of Fortune" set.
\textsuperscript{129} See supra notes 60-64 and accompanying text (discussing the line of cases extending identity based on the "trappings" that surround celebrity status).
\textsuperscript{130} See supra notes 39-40 and accompanying text (discussing the similarity of the entitlement of celebrity status to the entitlement of a farmer to the produce of his or her fields).
\textsuperscript{131} The new letter-turner could possibly be sued by the show's copyright holder.
\textsuperscript{132} See Nurmi v. Peterson, 10 U.S.P.Q. (BNA) 1775, 1778 (C.D. Cal. 1989) (stating, in passing on suit by originator of "Vampira" character against similar "Elvira" character, "because these allegations do not amount to the claim that the plaintiff's actual features were used by the defendants for commercial purposes, no common law right of publicity or privacy action can be maintained").
\textsuperscript{133} Further analogies can be drawn, such as allowing Clayton Moore an exclusive right of publicity in the "Lone Ranger" role, or allowing Arnold Schwarzenegger to sue Steven Seagal for invading his well-developed role of the muscle-bound adventurer. Cf. Carlos V. Lozano, \textit{West Loses Lawsuit over Batman TV Commercial}, \textit{L.A. Times}, Jan. 18, 1990, at B3 (describing former "Batman" actor's unsuccessful right of publicity lawsuit over TV commercial produced under license from DC Comics, the Batman copyright holder).

Another interesting wrinkle would be presented if White were alive and litigating when "Wheel of Fortune"s" copyright expires, or if her heirs sued in a jurisdiction where the right of publicity is descendible. At this time, the copyrighted material contained in the show enters the public domain, and the public is to have full access. The right of publicity, however, constrains these public rights.
B. THE RIGHT OF PUBLICITY ARTIFICIALLY GRANTS PRIVATE CONTROL OF PUBLIC IMAGE

The right of publicity unrealistically views the relationship between art and audience, and, by analogy, celebrity and audience. This right violates the basic tenet that once a work of art or other piece of popular culture enters the public domain, the role of the artist or creator is largely over, and its meaning is determined by the audience. In addition, by elevating the

134. Celebrities certainly are a substantial part of modern popular culture. “The fact that we have given Vanna White celebrity is a key to seeing our society today. Stars often lead us into new social trends. . . . But very little serious thinking or research has gone into this field. Which is amazing, considering how important stars are to our society.” Hurley, supra note 91, at 50 (quoting Jib Fowles, professor of media studies at the University of Houston in Clear Lake).

135. “Classification as art . . . does not rest solely on the intrinsic qualities of the object, but on the assumptions of the viewer and the culture. Conferring artistic status is an act based upon a social and institutional framework.” Robert Silberman, What’s Art and What’s Not?, ARTs, at 8. The semiotic power contained in celebrity identity, and exploited by the celebrity and other users, can be seen as arriving at its meaning through the same, culturally-determined process.

Italian author Italo Calvino has written on the dynamic relationship between artist and audience and the instillation of meaning into a work of art, exemplified here by the relationship between author and reader:

I read in a book that the objectivity of thought can be expressed using the verb “to think” in the impersonal third person: saying not “I think” but “it thinks” as we say “it rains.” There is thought in the universe—this is the constant from which we must set out every time.

Will I ever be able to say, “Today it writes,” just like “Today it rains,” “Today it is windy”? Only when it will become natural to me to use the verb “write” in the impersonal form will I be able to hope that through me is expressed something less limited than the personality of an individual.

And for the verb “to read”? Will we be able to say, “Today it reads” as we say “Today it rains” if you think about it, reading is necessarily an individual act, far more than writing. If we assume that writing manages to go beyond the limitations of the author, it will continue to have a meaning only when it is read by a single person and passes through his mental circuits. Only the ability to be read by a given individual proves that what is written shares in the power of writing, a power based on something that goes beyond the individual. The universe will be able to express itself as long as somebody will be able to say, “I read, therefore it writes.”

ITALO CALVINO, IF ON A WINTER’S NIGHT A TRAVELER 176 (William Weaver trans., 1979). In Calvino’s view, therefore, it is only the audience and the meaning it attaches to a work that renders it “expression.”

T.S. Eliot echoes the theme of artist as conduit for something beyond the artist’s self: “What happens is a continual surrender of [the artist] as he is at the moment to something which is more valuable. The progress of an artist is a continual self-sacrifice, a continual extinction of personality.” T.S. ELIOT, SELECTED ESSAYS 17 (1972). The view of artistic creation posited by Calvino and
commercial nature of the celebrity identity's use to dispositive status, courts have created an artificial distinction that does not exist in our world of audience-determined meaning.\footnote{Eliot contrasts sharply with the self-aggrandizement inherent in the right of publicity. This leads one back to the question of whether the right of publicity actually protects or fosters any sort of creative impulse other than the desire to remain a celebrity. Another writer reinforces this view, stating that the modern celebrity is "a person who is known for his well-knownness . . . . He is the human pseudo-event." Hurley, supra note 91, at 52 (quoting Daniel J. Boorstin).}

The idea of a celebrity attempting to control the development of his or her own identity is illuminated by the concept of "preferred meaning."\footnote{The "preferred meaning" of a product, celebrity, or other item is the meaning that the artist or celebrity intends for the product of his labors, whether it be a work of art or her own image, that also comports with the dominant ideological view in society. White's preferred meaning for herself is as everyone's neighbor, approachable. She states, "I'm playing myself, not a}

The right of publicity acts to institu-
tionalize a star's preferred meaning over other meanings the popular culture may attempt to instill. In reality, this endeavor cannot be successful, because the popular culture will overcome. But, it may operate on the margins to discourage those meanings most at odds with the preferred meaning.

An example of how different audiences may imbue a product with different meanings beyond the preferred meaning, and far beyond the originator's control, is the "Ken Doll."139 The manufacturer of this well-known piece of Americana recently created a version of the doll with an earring and wearing a lavender mesh shirt.140 In so doing, the manufacturer was attempting to create a "Beverly Hills 90210" look for Ken.141 The new "Earring Magic Ken," however, quickly found his way to the mantelpieces of gay men across the country, and became a gay cultural icon.142

This illustrates how control of a preferred meaning may be lost, and also illustrates the type of meaning that celebrities have attempted to stifle through the right of publicity.144 This example also demonstrates that courts referring to any "painstaking development of image"145 are according celebrities far too much clout in the image-making process, and depriving the audience of its right to continue the process of determining meaning. Freezing the process at the most advantageous point for the celebrity is an attempt to create economic rent for the celebrity that is contrary to this process, and stultifies cultural development.146

role." Hurley, supra note 91, at 55. Other meanings, however, exist. White is the "drum majorette for the long march back to the 1950's," id. at 55, or "the log cabin-to-the-White House story... an inspiration," id. at 53, or "a harbinger of the reemergence of traditional feminine behavior." Id. at 50. Popular culture is clearly at war over her message, and further meanings may yet emerge.


140. Id.

141. "Beverly Hills 90210" is a popular television show on the Fox network aimed primarily at high school viewers.

142. Frank DeCarco, Ken's All Dolled Up, but is He Still Hetero-Hunky?, MINNEAPOLIS STAR TRIB., March 8, 1993, at E4.

143. Id.

144. Mattel spokesperson Donna Gibb stated, in an attempt at damage control, that Earring Magic Ken is "a fun, wholesome toy for young girls. [He] was not intentionally designed for any audience other than our primary one, girls age 3 to 10." Id.


146. A celebrity's right to "free expressive association" not to be associated with causes, products, or other cultural entities of which she disapproves may
C. AN ALTERNATIVE: THE RIGHT OF PERFORMANCE

In place of the broad "right of publicity," courts should create a new doctrine based on the "right of performance,"\(^{147}\) identified by commentators and at least implicated by the Supreme Court.\(^{148}\) This new right would protect celebrities (and others) from actions that directly fulfill the demand for the celebrity's performance value. The right of performance would protect claimants from two aspects of exploitation: exploitation of personal aspects of identity, such as through voice imitations or celebrity look-alike; and direct exploitation of a performance, such as through non-consensual videotaping and broadcast of a performance.

This cause of action would consist of use of a person's performance identity or performance without consent. Imitation of

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147. See supra notes 15, 59 and accompanying text (distinguishing the right of publicity from the right of performance).

148. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1976). See supra note 59 and accompanying text (discussing the deprivation of direct income from the celebrity by offering the advantage of a celebrity's recognition at a bargain price). Such a performance would have to be uncopyrightable under federal copyright law to avoid preemption.
“style” alone would be insufficient. This cause of action would give no weight to whether a use was “commercial,” recognizing the underlying commercial nature of most, if not all, uses.

For example, the alternative/grunge rock band Stone Temple Pilots and lead singer Weiland have frequently been accused of pirating fellow alternative/grunge rock band Pearl Jam, both in sound and in Weiland’s imitation of Pearl Jam singer Eddie Vedder’s facial grimaces. Spin magazine refers to Vedder’s “famously furrowed brow and collection of passionate grimaces” as a “near-icon.” Jim Greer, The Courtship of Eddie Vedder, SPIN, Dec. 1993, at 56. Numerous commentators nationwide have noticed the similarity. See, e.g., David Corn, Whole Lotta Policy Goin On: Some Modest Proposals for Reinventing Government with Grunge, WASH. POST, Oct. 3, 1993, at C5 (“[Using the Stone Temple Pilots song ‘Dead and Bloated’ as a metaphor for Washington] may run the risk of alienating the sizable audience of Pearl Jam fans, many of whom dismiss the Pilots as Pearl Jammabes.”); Nicole Arthur, WASH. POST, Aug. 12, 1993, at C3 (review) (Stone Temple Pilots are “Pearl Jam soundalikes”); Gary Graff, Stone Temple Pilots Chart Their Own Course, DETROIT FREE PRESS, July 23, 1993, at 1B (noting soundalike controversy).

Even MTV’s ubiquitous cartoon duo, Beavis and Butt-head, have noted the “sound-alike” controversy, while watching a video of the Stone Temple Pilots’ “Plush,” wherein Weiland allegedly cops Vedder’s vocal and facial mannerisms. See Christopher J. Farley, Rock’s Anxious Rebels, TIME, Oct. 25, 1993, at 60. Vedder claims not to have seen the video, but states “all my friends have mentioned it to me.” Greer, supra, at 56.

Surprisingly, the foregoing scenario seems to contain many of the elements for stating a right of publicity action. The documentary evidence establishes Vedder’s mannerisms as extremely well-known. Weiland and the Stone Temple Pilots have clearly evoked Vedder’s identity, for substantial commercial gain. While Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1101 (9th Cir. 1992), approvingly cited jury instructions forbidding a violation for appropriation of “style,” White holds any judgment on specific means of appropriation in abeyance, stating, “It is not important how the defendant has appropriated the plaintiff’s identity, but whether the defendant has done so.” White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993). The court further notes that denoting any “laundry list” of appropriative means would be “impossible.” Id.

An important limitation on the right of publicity is shown in an unpublished case, Uri Geller v. Fallon McElligott (cited in Kent, supra note 11, at 6). In this case, Uri Geller, a well-known psychic who claims to possess such abilities as bending forks and stopping time, sued based on a Timex ad where a psychic was shown performing actions similar to plaintiff’s claimed abilities, but being unable to stop a Timex watch.

Although the court dismissed plaintiff’s action on other grounds, proceeding under a right of performance cause of action would reach the same result. Implicit in the right of performance doctrine is the requirement that the “performance” in question be unique to the plaintiff. Thus, although this right may develop beyond unfair competition law as embodied in the Lanham Act, which it closely resembles, there is room for it to develop into its own unique area of law. Distinguishing this new right from copyright law is the fact that, although not allowing a property right in a claimed ability to stop time, this right would allow a property right in a surreptitiously taped performance of Uri Geller actually stopping time. This new right is distinguished from § 43(a) of the Lanham Act in that it does not require an element of false endorsement.
Plaintiffs could prove damages by looking to the open market to determine the going rate for the performance in question. A parody defense would not be necessary, as parodies do not directly exploit celebrities’ performance identity.

Vanna White would have no cause of action under the right of performance. Because the Samsung commercial does not constitute a performance opportunity for White, her performance identity is not being exploited. The right of performance would contain no falsity element, so if White could prove that consumers might believe she was endorsing Samsung’s products, she would be confined only to a federal cause of action under the Lanham Act. This is because the right of performance is concerned with protecting direct performance opportunities for actors, musicians, and other artists, rather than protecting the public from misleading commercial information.

Each aspect is built on solid precedential grounds. Additionally, it would not stultify cultural development by privatizing a celebrity’s preferred meaning, and would allow parodies and other uses, including those for commercial gain, to flourish. This limited right would not conflict with the federal intellectual property scheme, as the right of publicity increasingly does. Relatedly, by preserving the right of performance as state law, state-by-state development of the right can continue on a restrained basis.

150. See supra note 59 and accompanying text (distinguishing fair use parody doctrine from the rights of publicity and performance).

151. See supra note 117 (requiring satirists to use the subjects of satire themselves destroys the effect of satire).

152. See supra note 7. An example of a right of performance action without any possible concurrent falsity action might be a commercial featuring a celebrity look-alike, but with a disclaimer stating that the actual celebrity is not involved. There is no deception, but the look-alike may be directly fulfilling demand for the celebrity.


154. Imitation of a performer’s personal characteristics is exemplified by such cases as Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), and exploitation of an entire performance is exemplified by Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1976).

155. See supra notes 109-133 and accompanying text (discussing the conflict between celebrity protection and traditional intellectual property law).

156. This is important as modern technology develops new methods that are capable of exploiting performance rights, such as computer animation and digital sampling. Computer animation promises soon to be able to bring deceased actors back from the dead for new starring roles, or even to replicate current stars. Right of publicity law currently does not cover this situation, and state-by-state development is important to take adequate account of this new tech-
CONCLUSION

White continues a long line of state and federal cases that fail to adequately justify the right of publicity’s existence, or to make any kind of accounting of the social costs imposed by the right of publicity in its current expansive form. This Note proposes that the right of publicity be entirely done away with as a celebrity right, or at least severely curtailed. In its place, courts and state legislatures should create a right of performance, protecting entertainers from direct economic competition in fulfilling demand for their performance identity. This new right would protect performers’ primary income-earning potential, give the public access to celebrity identity for artistic and other cultural purposes, allow the federal intellectual property scheme to function without interference from over-expansive state laws, and would allow for state-by-state development to account for the ever-changing nature of celebrity and technology.
