Right of Publicity

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II. RIGHT OF PUBLICITY

A. Exclusive Use Of Name And Likeness


*Here’s Johnny!* That familiar phrase had its day in court in *Carson v. Here’s Johnny Portable Toilets, Inc.* in which entertainer Johnny Carson successfully established his exclusive right to the magic words. The Sixth Circuit held that a portable toilet company had infringed Carson’s right of publicity by using the phrase without Carson’s permission.

Appearing as plaintiff and appellant was John W. Carson (“Carson”), better known to television audiences as Johnny Carson, the host of “The Tonight Show.” For more than twenty years, Carson has been introduced with the phrase “Here’s Johnny” on his program aired on the National Broadcasting Company (“NBC”) network. The introduction is usually given by Ed McMahon and is said in a distinctive way, emphasizing and prolonging the word “here’s.” Prior to the suit, the phrase had never been registered as a trademark or service mark.

Joining Carson as plaintiff was Johnny Carson Apparel, Inc., a manufacturer and marketer of men’s clothing. Johnny Carson was the president of the clothing firm and owned twenty percent of its stock. The firm used the phrase “Here’s Johnny” on its clothing labels and in its advertising. In 1977, the clothing company granted a license to Marcy Laboratories to use “Here’s Johnny” for a brand of men’s cologne and similar products. Additionally, in 1967, Carson had authorized the use of the

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2. The right of publicity was defined in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953): “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 . . . . This right might be called a ‘right of publicity.’”
3. 698 F.2d at 832.
4. Id. at 838.
5. Id. at 833. See Ames Publishing Co. v. Walker-Davis Publications, Inc., 372 F. Supp. 1 (E.D. Pa. 1974) (holding that trademark protections can be invoked even if the mark has not been formally registered); Interstate Brands Corp. v. Way Baking Co., 79 Mich. App. 551, 261 N.W.2d 84 (1977) (trademark rights must grow out of usage; mere formal registration is insufficient).
phrase for a chain of restaurants known as "Here's Johnny Restaurants."  

The defendant and appellant, Here's Johnny Portable Toilets, Inc., ("the company"), was a Michigan corporation engaged in the renting, selling, and servicing of portable toilets. Its founder, Earl Braxton, said he was aware when he formed the corporation that the phrase "Here's Johnny" was associated with Carson and was used on "The Tonight Show." Braxton said he intended to use the name as a play on words. He also indicated that his advertising coupled that phrase with another, "The World's Foremost Commodian," to make a play on the word "comedian."  

In 1976, Carson sued the company, alleging unfair competition, trademark infringement, and invasion of the rights of privacy and publicity. The plaintiffs sought damages and an injunction prohibiting the company from using "Here's Johnny" in connection with its business.  

After a bench trial, the United States District Court for the Eastern District of Michigan issued a memorandum opinion and order. The district court dismissed Carson's complaint. In regard to the claims of unfair competition and trademark infringement, the court held that Carson had failed to satisfy the "likelihood of confusion" test. Regarding the right of privacy and right of publicity, the district court held that those rights extend only to a "name" or "likeness," and the phrase "Here's Johnny" did not qualify.

6. Carson, 698 F.2d at 833.
8. Carson, 698 F.2d at 833.
9. Id.
10. Id. Although Carson's case was dismissed in the district court, the entertainer prevailed in a similar trademark suit filed in Canada at approximately the same time. In Carson v. Reynolds, 2 F.C. 685 (1980), Carson appealed a decision by the Registrar of Trade Marks to register "Here's Johnny" to William A. Reynolds as a trade name for portable toilets. On appeal to the Federal Court of Canada, the court found that a significant number of people in that country associated the phrase, "Here's Johnny," with Johnny Carson. The Canadian federal court held that under the Trade Marks Act the phrase could not be registered without Carson's consent. 2 F.C. at 690.
11. Carson, 698 F.2d at 833. See Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 647 (6th Cir. 1982), cert. denied, 459 U.S. 916 (1982). In determining if a trademark has been infringed, the court held that only the likelihood of confusion must be shown, not actual confusion.
12. Carson, 698 F.2d at 833. In describing the right of publicity, Dean Prosser extends it to a name or likeness. Prosser, Privacy, 48 CALIF. L. REV. 383, 398 (1960) [hereinafter cited as Privacy].
On appeal, the Sixth Circuit affirmed the district court's finding that the likelihood of confusion test had not been met for trademark infringement and unfair competition. Applying federal trademark law and Michigan common law, the court examined several factors that must be balanced to determine if there was a likelihood of confusion. The court noted that establishing the various factors is a question of fact, while the weighing of those factors is a question of law.

The Carson court agreed with the district court, stating that "Here's Johnny" was not such a strong mark that its use for other purposes was entirely forbidden. The district court had emphasized that the company's use of the phrase "Here's Johnny" for its toilets was completely unrelated to Carson's use of the phrase on his television program and by the clothing company. Although the toilet company intended to gain a benefit from the phrase, it did not intend to deceive the public into believing that Carson was involved with its business. There was no evidence that the public had actually confused Carson with the company. Nor was there evidence that the company's use of the phrase had actually

13. Carson, 698 F.2d at 833. Any person knowing that an article carries a false description of origin, and who causes that article to be used in commerce, is liable to any person who believes he is damaged by that false description or representation. The Lanham Trade-Mark Act § 43(a), 15 U.S.C. § 1125(a) (1976).

14. The court cited Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, cert. denied, 459 U.S. 916 (1982) (likelihood of confusion test met where defendant advertised its restaurant franchise in plaintiff's exclusive marketing area) and Wills v. Alpine Valley Ski Area, Inc., 369 Mich. 23, 118 N.W.2d 954 (1963) (Michigan plaintiff failed to show likelihood of confusion between his ski and sport shop and the defendant ski area which was twenty miles away). Although none of the parties relied on Michigan statutes, a state's corporation law may apply. The law requires that a corporation's name not be the same or confusingly similar to the name of a foreign corporation authorized to transact business in the state. MICH. COMP. LAWS ANN. § 450.1212 (West 1973). The statute conceivably could be used against the toilet company by Johnny Carson Apparel, Inc., a New York corporation, which used "Here's Johnny" in its advertisements.

15. The court in Frisch's Restaurants examined the following factors to determine if there was a likelihood of confusion:
   1. strength of plaintiff's mark;
   2. relatedness of the goods;
   3. similarity of the marks;
   4. evidence of actual confusion;
   5. marketing channels used;
   6. likely degree of purchaser care;
   7. defendant's intent in selecting the mark;
   8. likelihood of expansion of the product line.

670 F.2d at 648.

16. Carson, 698 F.2d at 833.

17. Id. at 833-34. See Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema Ltd., 604 F.2d 200 (2d Cir. 1979) (defendant's pornographic movie, "Debbie Does Dallas," could hurt the plaintiff cheerleaders' reputation even though the parties' activities were not related).
damaged Carson. After considering these factors, the court agreed with the district court that the use of the phrase "Here's Johnny" would not support an action for trademark infringement or unfair competition.

The court also affirmed the district court's finding that Carson's right of privacy had not been invaded. The court agreed with the plaintiff that being associated with a toilet company "does not appeal to Carson's sense of humor," but it found no facts to suggest that the company's use of the phrase had invaded Carson's privacy.

The court next turned to the issue of the right of publicity:

The right of publicity was developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.

The court noted that the district court had dismissed Carson's claim based on the right of publicity because the company had not used Carson's name or likeness. However, the court found that the district court's view of the right was too narrow. "If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used. Carson's identity may be exploited

18. Carson, 698 F.2d at 834.
19. Id. Dean Prosser has identified four types of invasion of privacy: (1) intrusion upon one's seclusion or solitude; (2) public disclosure of embarrassing facts; (3) publicity that places one in a false light; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. The first three represent the right "to be let alone;" the fourth has helped defined the right of publicity. Privacy, supra note 12, at 389.
20. Carson, 698 F.2d at 834. A news story that appeared during the district court trial quoted Carson as saying: "It's an embarrassing association. . . . People thinking that you might be involved in association with a toilet will make jokes about it." Long Beach Press-Telegram, Sept. 5, 1980, at A2, col. 5. Another news story appearing at the time of the appellate hearing was headlined: "Johnny turned off by bathroom humor." Long Beach Press-Telegram, May 28, 1982, at A2, col. 1. These reports, widely disseminated by the Associated Press, suggest that Carson may have suffered an invasion of privacy.
22. Ironically, Carson had lost a previous suit over the use of his name and photograph because the jurisdiction did not recognize the right of publicity. In Carson v. National Bank of Commerce Trust & Sav., 501 F.2d 1082 (8th Cir. 1974), the defendant bank's travel agency had advertised a "Nebraskan's Johnny Carson Tour of Las Vegas." The trip included tickets to a Carson show in Las Vegas. Although the advertisement used Carson's name and photograph without his permission, the court found no violation because Nebraska common law did not recognize the right of publicity.
even if his name, John W. Carson, or his picture is not used."\textsuperscript{23}

The court noted that the company's president admitted he knew the phrase "Here's Johnny" was used by Carson, and that the company chose its name because of the identification with Carson. The court found that this showed the company had appropriated Carson's "identity" to promote its own corporate name and product. The court held that the right did not depend on Carson's full name being used.\textsuperscript{24} "[T]here would have been no violation of his right of publicity even if appellee had used his name, such as 'J. William Carson Portable Toilet' . . . [t]hough literally using appellant's 'name,' the appellee would not have appropriated Carson's identity as a celebrity. Here there was an appropriation of Carson's identity without using his 'name.'"\textsuperscript{25}

In discussing the policy reasons supporting its decision, the court noted that Carson's achievements have a value and will be protected by the right of publicity. Protecting that right encourages achievement by others in Carson's chosen field of entertainment. Protecting the right also prevents unjust enrichment by others who seek to exploit Carson's success without his consent.\textsuperscript{26}

To support its broader interpretation of the right of publicity, the court looked to three cases that expanded the right of publicity beyond the plaintiff's name or likeness.

In \textit{Motschenbacher v. R.J. Reynolds Tobacco Co.},\textsuperscript{27} the Ninth Circuit held that the plaintiff's right of publicity extended to a photograph of the plaintiff's racing car, which was used without permission in the defendant's television commercial. The defendant had altered some of the car's features\textsuperscript{28} and the plaintiff, race car driver Lothar Motschenbacher, was not identifiable in the picture. However, the picture showed the distinctive colors of Motschenbacher's car. "These markings were not only peculiar to the plaintiff's cars, but they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff."\textsuperscript{29} The court held that although Motschenbacher's

\textsuperscript{23} \textit{Carson}, 698 F.2d at 835.

\textsuperscript{24} \textit{Id.} at 836. In the wake of the circuit court ruling, Here's Johnny Portable Toilets, Inc. changed its name. In 1984, the firm was doing business in Michigan under the name "Johnny's Here." (Based on September, 1984 telephone calls to defendant's business office.)

\textsuperscript{25} \textit{Id.} at 837.

\textsuperscript{26} \textit{Id.} For a discussion of the policy reasons behind the right of publicity, see generally Hoffman, \textit{supra} note 2, at 116-19.

\textsuperscript{27} 498 F.2d 821 (9th Cir. 1974).

\textsuperscript{28} \textit{Id.} at 822. On the photograph of the plaintiff's racing car, the defendant had changed the car's number from "11" to "71;" the defendant also added a spoiler device bearing the name of its product.

\textsuperscript{29} \textit{Id.} at 827.
name or likeness was not directly used, Motschenbacher's identity via the car could be protected.

In *Ali v. Playgirl, Inc.*, the United States District Court for the Southern District of New York held that boxer Muhammad Ali's right to publicity had been violated by the unauthorized publication of a drawing in Playgirl magazine. The drawing showed a figure resembling Ali, seated in the corner of a boxing ring. Although the drawing was captioned "Mystery Man," the accompanying verse referred to the figure in the drawing as "The Greatest," Ali's nickname. The drawing plus the use of the phrase "The Greatest" was sufficient to allow the court to conclude that Ali's right to publicity had been invaded. Like the facts in *Carson*, a phrase was protected, but in *Ali*, the phrase was used in conjunction with a drawing.

In *Hirsch v. S.C. Johnson & Son, Inc.*, the Supreme Court of Wisconsin held that football player Elroy Hirsch, known during his career as "Crazylegs," could protect his right to publicity when the defendant manufacturer began marketing a shaving gel for women's legs under the name "Crazylegs." The manufacturer did not seek Hirsch's permission to use the name. The court held that the fact that "Crazylegs" was Hirsch's nickname and not his real name did not preclude a cause of action. "All that is required is that the name clearly identify the wronged person . . . . It is argued that there were others who were known by the same name. This, however, does not vitiate the existence of a cause of action." The *Hirsch* court extended the right of publicity closer to the facts in *Carson*. In *Hirsch*, the fact that there may be many people known as "Crazylegs" did not defeat the plaintiff's claim. Likewise, the use of the common first name in "Here's Johnny" did not prove fatal to Carson's claim.

The dissenting opinion in *Carson*, while recognizing that there is a right to publicity, said that the right should not be extended beyond an individual's name, likeness, achievements, identifying characteristics, or actual performances. According to the dissent, the phrase "Here's Johnny" was not within those boundaries. The use of the name "Johnny" in the phrase is such a common name that "it is meaningless or ambiguous at best in identifying Johnny Carson, the celebrity."

The dissent next outlined some policy problems raised by the major-

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31. 90 Wis. 2d 379, 280 N.W.2d 129 (1979).
32. *Id.* at 384, 240 N.W.2d at 137.
33. 698 F.2d at 837.
34. *Id.* at 838.
ity’s opinion. The dissent noted three basic policy considerations that support a broad reading of the right of publicity.  

First, protecting publicity rights permits celebrities to profit from the fame they have created. This recognizes that a celebrity’s name and likeness have a pecuniary value that can be protected. But the dissent said that in Carson’s case, the phrase “Here’s Johnny” was not part of any identity that Carson himself created. The phrase was merely a simple and common introduction. The phrase was not said by Carson, but was said by someone else of him.

The company used the phrase “outside the context” in which it was used by Carson, basing its use on the double entendre value of the word “john” as a term for a toilet. Therefore, the dissent found, it “does little to rob Johnny Carson of something which is unique to him or a product of his own efforts.”

Second, the right of publicity provides a financial incentive for individuals to expend the time and resources to produce intellectual and creative works. These benefits eventually expand from the individuals to benefit society at large. Others viewing Carson’s success may be encouraged to enter the entertainment field themselves, knowing that whatever fame they create will be protected. But in this case, the dissent said, Carson would be receiving a windfall. Since Carson neither created the phrase “Here’s Johnny” nor performed it, he gained an economic reward for the time, effort and work of someone else.

Third, the right of publicity prevents unjust enrichment. The celebrity who expends time and effort in creative pursuits will be protected against outsiders attempting to reap what the celebrity has sown. The dissent said that the company may be enriched by the use of the phrase “Here’s Johnny,” but this enrichment is not at Carson’s expense because

35. Id. See Hoffman, supra note 2, at 116: “The scope of the right of publicity ought to be delineated with policy considerations in mind.”
36. Carson, 698 F.2d at 839. The dissent wrote: “Ed McMahon [Carson’s announcer] arguably has a competing interest in the same phrase because it is said by him in a distinctive and drawn out manner as his introduction.” Id. at 839 n.5.
37. Id. at 839. However, Hoffman notes that the right of publicity protects more than pecuniary rights. A celebrity also may object to exploitation on the grounds that the defendant’s use is embarrassing or offensive. Hoffman, supra note 2, at 117.
38. Carson, 698 F.2d at 839. See Hoffman, supra note 2, at 118.
39. Carson, 698 F.2d at 839. The dissent assumed that Carson played no part in developing the phrase “Here’s Johnny.” It is true that the phrase is spoken by someone else. However, the fact that Carson has used the same introduction over the years on different television programs (and different networks) suggests that he has some personal control over the phrase. See Carson, 498 F. Supp. at 73.
he made no personal investment in creating the phrase.\textsuperscript{40}

The dissent also noted that unjust enrichment is adequately prevented by federal and state trademark law. The majority had held that Carson failed to meet the likelihood of confusion test required under those laws. Thus, there was no need to grant Carson further protection against wrongdoing. The dissent noted that the policies favoring the right of publicity must be balanced against societal interests of free expression and free enterprise. This is especially true when the individual's right is being expanded beyond the law's previous limits.\textsuperscript{41}

The dissent declared that Carson's right of publicity gave him a common-law monopoly on the phrase "Here's Johnny." The phrase was taken out of the public domain, "without extracting from Johnny Carson a personal contribution for the public's benefit."\textsuperscript{42} Such a common-law monopoly did not require a formal filing with the government, as would be required for a federal trademark, patent or copyright. This raises the problem of notice. The majority's opinion expands the right of publicity, the dissent said, going beyond name, likeness and performances to more subjective attributes, such as a phrase used on Carson's television program. This makes it difficult for the public to determine what aspects of a celebrity's performance will be protected by the courts. Parties seeking to use a particular phrase have no way of learning if the phrase will be protected, unlike the implied duty to investigate a registered trademark. Parties who want to use such phrases will act at their peril, and the result will be "a chilling effect on commercial innovation."\textsuperscript{43}

The dissent also noted that there is a federal interest in protecting the public's first amendment right to freedom of speech. "Strong federal policy permits the free use of intellectual property, words, and ideas that are not protected by a valid copyright, patent, or trademark."\textsuperscript{44} Trademark law protects original works that fix the author's expression of an idea or concept in a tangible form.\textsuperscript{45} However, according to the dissent,

\begin{quotation}
40. Carson, 698 F.2d at 839. See Hoffman, supra note 2, at 118-19 (noting that wrongful conduct hurts not only the celebrity, but also the public, which has been deceived).

41. Carson, 698 F.2d at 839. Hoffman notes that in many cases, celebrities have already been generously compensated for their works and any additional compensation that is protected by the right of publicity is "more like the proverbial icing on the cake than a necessary inducement." Hoffman, supra note 2, at 119-20. Hoffman suggests that celebrities often cash in on their fame by endorsing products far outside the scope of their talent. "Joe Namath may have enriched society with his glorious athletic feats, but the same cannot be said of his endorsements of deodorant and popcorn makers." Hoffman, supra note 2, at 120-21.

42. Carson, 698 F.2d at 840.

43. Id.

44. Id. at 841.

\end{quotation}
the phrase "Here's Johnny" is a mere idea or concept that should not be entitled to trademark protection.

Carson has been subsequently cited, but none of those cases has further advanced the definition of the right of publicity. While the majority opinion in Carson strives to protect Johnny Carson's "identity" rather than his name, the phrase at issue does contain Carson's first name. It is still not clear if the right of publicity can be extended to those non-name phrases, used by public figures, which so frequently work their way into our national argot.

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46. Carson has been cited in the following cases: University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 703 F.2d 1372, 1376 (D.C. Cir. 1983) (likelihood of confusion test not met when brand of cheese adopted name similar to university's name); Railroad Salvage of Conn., Inc. v. Railroad Salvage, Inc., 561 F. Supp. 1014, 1019 (D.R.I. 1983) (likelihood of confusion test is met in action to enjoin nearby defendant from operating store under a similar name); Reeves v. United Artists, 572 F. Supp. 1231, 1233 (N.D. Ohio 1983) (professional boxer's right of publicity not descendible); Westward Co. v. Gem Products, Inc., 570 F. Supp. 943, 945 (E.D. Mich. 1983) (plaintiff's manufactured products likely to be confused with those of defendant).

47. Some examples of non-name phrases that have achieved notoriety are:
   "Sorry about that, Chief.": actor Don Adams, as Agent Maxwell Smart on television series "Get Smart."
   "I'm a wild and crazy guy!": comedian Steve Martin.
   "Yabba dabba doo!": cartoon character Fred Flintstone.
2. Right Of Publicity Clarified

There's a saying in Hollywood that you know you've made it when it's harder to keep your name out of the papers than to get it in. For those trying to stop publicity, California has both a common law and a statutory right of publicity.\(^1\) This doctrine may be defined as the right of an individual to have personal control over the commercial display and exploitation of his or her personality and talents.\(^2\) A breach of the right of publicity involves the unauthorized commercial exploitation of a person's name, image, or likeness, as well as other aspects of identity, such as biographical facts and one's actual performance.\(^3\) Although a fairly recent development, the right of publicity has received considerable attention as numerous celebrities or their estates have sought to claim it.\(^4\)

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2. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.) (first case to use and define the phrase, "right to publicity"), cert. denied, 346 U.S. 816 (1953).

3. 2 T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW § 19.01 (1983).

In *Eastwood v. Superior Court*,⁵ well-known actor and entertainer Clint Eastwood became one of the latest to assert this right.

The National Enquirer published an article about Eastwood's alleged romantic involvement with two other celebrities. Eastwood was pictured on the April 13, 1982, front page above the caption, "Clint Eastwood in Love Triangle." The same photograph and caption were also shown in related television advertisements.

The article stated that Eastwood had angrily left his longtime girlfriend, actress Sondra Locke, because she was pressuring Eastwood into marriage. It continued that, during the separation, Eastwood met singer Tanya Tucker and was "immediately smitten." Eastwood was then allegedly locked in a romantic triangle between Locke and Tucker, and the two women were fighting over him.⁶

Eastwood's second cause of action was for commercial appropriation of his right of publicity under both the common law and California Civil Code Section 3344.⁷ The Enquirer demurred, contending that Eastwood failed to state a cause of action.⁸ It contended that it was exempt from the statute because Eastwood's name and photograph were not used to imply an endorsement and, even if they were so used, the use was in connection with a news account. The trial court sustained the demurrer without leave to amend. Eastwood petitioned the appellate court for a writ of mandate to compel the lower court to set aside its order.⁹ The court held that Eastwood's second cause of action was, indeed, defective, but that it could be cured by incorporating by reference the *scienter* allegations in the first cause of action for false light invasion of privacy. Accordingly, the court issued a writ of mandate, vacating the lower court's ruling and granting Eastwood leave to amend.¹⁰

The right of publicity, commonly called "commercial appropriation," was originally a form of the right of privacy.¹¹ Although both

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6. *Id.* at 414-15, 198 Cal. Rptr. at 345. Portions of the issue appear as an appendix to the opinion. *Id.* at 427, 198 Cal. Rptr. at 353.
7. California Civil Code § 3344(a) provides, in pertinent part, that:

[any person who knowingly uses another's name, . . . photograph or likeness, in any manner, for purposes of advertising . . . products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons as a result thereof.

CAL. CIV. CODE § 3344(a) (Deering Supp. 1985).
10. *Id.* at 426, 198 Cal. Rptr. at 352-53.
11. California's common law right of privacy protects against four categories of invasion: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public
theories protect against the unauthorized use of one’s name, image, or likeness, the privacy theory seeks to compensate for mental and emotional, rather than pecuniary, injury.\textsuperscript{12} The common law right of publicity may be pleaded by alleging four elements: (1) defendant’s use of plaintiff’s identity; (2) appropriation of the plaintiff’s name and likeness to the defendant’s advantage; (3) lack of consent; and (4) resulting injury.\textsuperscript{13} The statutory remedy requires the additional allegation of the knowing use of plaintiff’s name, photograph, or likeness for purposes of advertising or solicitation of purchase\textsuperscript{14} and a direct connection between the use and the commercial purpose.\textsuperscript{15}

Eastwood’s second cause of action only alleged that the Enquirer had employed his name, photograph, or likeness without his prior consent for the purpose of promoting magazine sales. The Enquirer argued that Eastwood’s failure to allege the appearance of an endorsement was fatal to his claim.\textsuperscript{16} The court rejected this argument. California law does not impose an endorsement requirement.\textsuperscript{17}

Relying on Lugosi \textit{v. Universal Pictures},\textsuperscript{18} the Enquirer further argued that appropriation of name and likeness for commercial purposes could only be shown if the use had impressed the newspaper with a sec-

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\textsuperscript{12} T. \textsc{Selz} \& M. \textsc{Simensky}, \textsc{Entertainment Law} § 19.02 (1983).

\textsuperscript{13} W. \textsc{Prosser}, \textsc{Law of Torts} § 117 at 804-07 (4th ed. 1971).

\textsuperscript{14} \textit{Eastwood}, 149 Cal. App. 3d at 417, 198 Cal. Rptr. at 347. The unauthorized appropriation of a celebrity’s identity must be for a commercial purpose in order to constitute a publicity violation. Chaplin \textit{v. Nat’l Brdct’g Co.}, 15 F.R.D. 134 (S.D.N.Y. 1953). However, Professor Nimmer states a different view. In his article, \textit{The Right of Publicity}, 19 \textsc{Law \& Cont. Prob.} 203, 217 (1954), he proposed reliance on the rule of damages, reasoning that a defendant’s unauthorized use of plaintiff’s right of publicity for purposes other than advertising or trade would usually be of minor value to the defendant. Hence, such unauthorized use would result in only minimal damages for plaintiff.

\textsuperscript{15} Johnson \textit{v. Harcourt, Brace, Jovanovich, Inc.}, 43 Cal. App. 3d 880, 895, 118 Cal. Rptr. 370, 381 (1974). The \textit{Johnson} court held that the defendant’s use of an article, regarding the plaintiff, in a textbook, was not so directly connected with the sale that it fell within Section 3344.

\textsuperscript{16} \textit{Eastwood}, 149 Cal. App. 3d at 418, 198 Cal. Rptr. at 347.


The court disagreed. It interpreted Lugosi as standing only for the proposition that the right of publicity is not descendible and expires upon the death of the protected person. If, however, the protected name had acquired a secondary meaning, it would be further protectable as property under the unfair competition laws. But a secondary meaning is not required by either the common law or the clear language of the statute.

The court also rejected the Enquirer's contention that Eastwood was not commercially exploited. It noted that one of the primary purposes of advertising is to motivate a decision to purchase a particular product. Therefore, to the extent the Enquirer's use of Eastwood's personality and fame attracted the reader's attention, the Enquirer gained a commercial advantage.

The court then turned to the Enquirer's argument that the article was a news account and therefore exempt from liability by California Civil Code Section 3344(d). The unauthorized use of a celebrity's identity in connection with the dissemination of news or information of public interest is protected by the first amendment of the United States Constitution. Since most uses of a celebrity's identity do not fall squarely within the category of either privileged news or unprivileged commercial exploitation, courts employ a balancing test to determine the existence of first amendment protection.

This test involves weighing the competing interests of protecting the right of publicity against the societal benefits of free expression. For example, unprivileged uses have been found in the merchandising of some aspect of the celebrity's identity in posters or games. Also consid-
ered unprivileged is the imitation of a celebrity's performance. In contrast, interviews or the truthful use of a celebrity's name or likeness are protected by the first amendment. This balancing is significant, as a "proper accommodation between these competing concerns must be defined, since 'the rights guaranteed by the first amendment do not require total abrogation of the... right of publicity...'."

The court accepted that the purported romantic involvement of Eastwood with other celebrities is a matter of public concern—which generally precludes liability. However, Eastwood contended that the article and related advertisements were not constitutionally protected or exempt from liability because the article was a "calculated falsehood." The Enquirer argued that the article was, on its face, a news account and, therefore, exempt from liability by Civil Code Section 3344, regardless of whether it was true or false. The court completely rejected this argument: "The spacious interest in an unfettered press is not without limitation." The court was simply unwilling to apply first amendment protection when the entire article was allegedly false.

The question then became what standard of fault was to be applied. The court adopted the standard used in defamation cases and concluded that *scienter*, or "actual malice," is the applicable standard if the plaintiff is a public figure. *Scienter* may be defined as either knowledge of falsity or reckless disregard for the truth. This marked the first time that such a standard has been applied to a right of publicity case.


30. *Eastwood*, 149 Cal. App. 3d at 422, 198 Cal. Rptr. at 350 (quoting Briscoe v. Readers Digest Ass'n, 4 Cal. 3d 529, 541, 483 P.2d 34, 57, 93 Cal. Rptr. 866, 879 (1971)).


32. Id. at 425, 198 Cal. Rptr. at 352.

33. Id. at 424-25, 198 Cal. Rptr. at 351-52. Time, Inc. v. Hill, 385 U.S. 374, 387-91 (1967), has held not only that the factual reporting of newsworthy persons and events falls within the constitutional protections for speech and press, but also that no redress is available even for material and substantive falsification in such reporting in absence of proof that the report was published with knowledge of its falsity or a reckless disregard of the truth. See also N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (public officials required to demonstrate defendant's "actual malice" in defamation suits).


The deliberate and reckless fictionalization of Eastwood's personality constituted commercial exploitation and was actionable when it was presented to the reader as true. Although Eastwood's failure to allege scienter rendered the second cause of action defective, it was "[m]anifestly...cur[able] by amendment."36

Truthful accounts of celebrities are almost always exempt from liability under the first amendment. Also exempt are fictionalizations presented in the media, provided that the fictionalization is apparent to the public. The court addressed, for the first time, a right of publicity case that dealt with the deliberate, nondefamatory,37 fictionalization of a celebrity that was presented to the public as the truth.

Eastwood is significant in a number of respects. First, it clarifies the ever-expanding right of publicity. Second, its application of the "actual malice" standard and liberal construction of the element of commercial use suggests a broadening of remedies. A false account of a celebrity might not amount to a defamation, but the celebrity/plaintiff might still have a remedy under Section 3344.38

Moreover, when Eastwood was decided, it was "unsettled under California common law" whether a plaintiff could seek damages measured by the profits of defendant, as well as by harm to him or herself.39 A

made cursory reference to the "actual malice" standard and suggested the possibility of application in the appropriate publicity case. However, this was followed by Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 870-71, 603 P.2d 454, 461, 160 Cal. Rptr. 352, 359 (1979), which clearly stated that the "actual malice" standard really has no application in a right of publicity suit involving fictional works whose fictional nature is clearly apparent to the public.

36. Eastwood, 159 Cal. App. 3d at 426, 198 Cal. Rptr. at 352.
37. This, of itself, can be a heavily litigated issue. See Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 283-84 (1974) (Jack London's vituperative definition of "scab" in the context of a labor dispute not defamatory); Rudin v. Dow Jones & Co., 557 F. Supp. 535, 536 (S.D.N.Y. 1983) (Frank Sinatra's attorney referred to as a "mouthpiece").
38. In Burnett v. Nat'l Enquirer, Inc., 144 Cal. App. 3d 991, 997, 193 Cal. Rptr. 206, 208 (1983), a piece in the Enquirer stated that comedienne, Carol Burnett, had acted boisterously in a Washington restaurant, spilling wine on one patron and giggling, and "traips[ing] around the place offering everyone a bite of her dessert." If behaving clownishly is how Burnett earns her living, the Enquirer might have argued that an account of clownish behavior could not be defamatory. Had such an argument prevailed, comprehensive pleading would have supplied a fallback remedy under the statute for a false account of her activities, to the extent that the Enquirer used that particular story to encourage sales.

The Burnett court also affirmed the trial court's finding that the Enquirer was not a "newspaper," and, therefore, not entitled to the benefit of California's retraction statute, "for purposes of the instant litigation." Id. at 1005, 193 Cal. Rptr. at 213-14. See CAL. CIV. CODE § 48a (Deering 1971).
39. Eastwood, 149 Cal. App. 3d at 426 n.10, 198 Cal. Rptr. at 352 n.10. However, one of the main rationales to support recognition of a right of publicity is the economic interest embodied in the right. The exclusive grant of a publicity right in exchange for compensation enables those whose achievements have rendered their identities commercially valuable to
1984 amendment to Section 3344 resolves this issue. A plaintiff may recover:

any profits from the unauthorized use that are attributable to the use . . . . In establishing such profits, the injured party [is] required to present proof only of the gross revenue . . . ., and the person who violated this section is required to prove his or her deductible expenses.40

The 1984 amendment also provides expressly for the award of punitive damages, as well as costs and fees to the prevailing party.41 Thus, a right of publicity theory under Section 3344 provides not only an alternative remedy, but also considerable leverage in litigation.

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"reap the reward of their endeavors . . . ." Zacchini v. Scripps-Howard Brdcast'g Co., 433 U.S. 562, 573 (1977). A celebrity's proprietary interest in the commercial value of his or her name and likeness has been analogized to an author's proprietary interest in his or her copyrighted work, id. at 575-76, and to a business's proprietary interest in its name and good will. Grant v. Esquire, Inc., 367 F. Supp. 876, 879 (S.D.N.Y. 1973). Further, the right of publicity protects the celebrity's future earning capacity and the economic interest of those with whom the celebrity has contracted for the authorized exploitation of his or her name and likeness. T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW § 19.01 (1983).

40. An Act to Amend Section 3344 of, and to Add Section 990 to, the Civil Code, Relating to Privacy and Publicity, 1984 Cal. Adv. Legis. Serv. ch. 1704, § 2 (codified at CAL. CIV. CODE § 3344 (Deering Supp. 1985), amending CAL. CIV. CODE § 3344 (Deering 1984)).
41. Id.