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THE RIGHT OF PUBLICITY: UNDERSTANDING A MISUNDERSTOOD RIGHT AFTER HOFFMAN v. CAPITAL CITIES/ABC

Natalie Fisher*

"To be blunt, the celebrities were violated by technology. Allowing this type of deceptive conduct to continue under the guise of First Amendment protection would lead to further technological mischief. The First Amendment provides extremely broad protection but does not permit unbridled exploitive speech at the expense of Mr. Hoffman and his distinguished career."¹

I. INTRODUCTION

Imagine that you are a movie star who, after years of struggle, frustration, and hard work has finally made it. Your face adorns magazine covers and your movies bring in millions of dollars at the box office. Life seems good. Then, one day you open a local magazine and see your photograph. Used without your permission... Which you did not pose for... Digitally altered to wear a dress and shoes you have never worn or even seen... Your reaction upon seeing your carefully marketed public persona exploited for financial gain? Anger, surprise, shock, disbelief. Imagine Dustin Hoffman’s reaction when he saw his picture in Los Angeles Magazine that used the original still photograph from the motion picture Tootsie digitally altered to appear that he wore a designer dress and shoes. Hoffman did not pose for the picture, nor did he consent to the magazine using his likeness.

The case of Hoffman v. Capital Cities/ABC, Inc. illustrates the conflict between the right of publicity and the First Amend-

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ment—between a celebrity's right to control the use of his or her identity and the right of the press to report news and current trends. This case underscores the unique nature of the right of publicity as simultaneously a property right and privacy right, combining elements of both and defying classification as exclusively one or the other. It also warns of the dangers of subjugating the property aspect of the right of publicity to its privacy aspect, neither of which gives justice to the hybrid nature of the right. *Hoffman v. Capital Cities/ABC, Inc.* epitomizes the dual nature of the right of publicity from its birth in 1953 to the present day. The wildly different outcomes in right-of-publicity cases in various courts reflect the need to clear up one-half century of confusion surrounding the right, to balance both the right of publicity and the First Amendment on the scales of justice, and to ensure some predictability in the future. *Hoffman v. Capital Cities/ABC, Inc.* not only brings to light the tension between the right of publicity and the First Amendment, it is made all the more timely by the rapid emergence of digital technology which makes it possible to find new ways to violate an old right.

In *Hoffman v. Capital Cities/ABC, Inc.* (Hoffman II),\(^2\) the United States Court of Appeals for the Ninth Circuit reversed the decision of the district court (Hoffman I)\(^3\) holding that the First Amendment protected Los Angeles Magazine's (LAM) right to publish a digitally altered photograph of Dustin Hoffman.\(^4\) In holding that Hoffman's photograph was not pure commercial speech,\(^5\) the court of appeals upset the delicate balance between the First Amendment and the right to publicity and extended the First Amendment protection to Los Angeles Magazine at the expense of Hoffman's right of publicity. Yet, the reasoning of both the district court and the court of appeals suffers from the same fundamental flaw—the myopic and limited understanding of the right of publicity as either a property or a privacy right, ignoring the right's dual nature and perpetuating the false dichotomy that has plagued it for nearly fifty years.

In 1997, Los Angeles Magazine published a photograph of

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4. See *Hoffman II*, 255 F.3d at 1189.
5. See id. at 1185.
Dustin Hoffman as he appeared in the motion picture *Tootsie*.

The picture was digitally altered to appear that Hoffman was wearing a designer silk gown and designer shoes. The photograph was accompanied by the following text: "Dustin Hoffman isn’t a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels." The photograph appeared in conjunction with an article entitled "Grand Illusions," in which LAM used computer technology to merge still photographs of famous actors and actresses from classic films with photographs of body models wearing spring 1997 fashions identifying the designers of the clothing used in the photographs. The article also referenced a “shopping guide” with prices and store information for the clothing used in the article. LAM did not seek or obtain permission from Hoffman to use his name and likeness in the article. Nor did LAM obtain permission from Columbia Pictures, the copyright holder, to use any image from *Tootsie* in its March 1997 issue. Hoffman filed suit against the magazine based upon the common law and statutory rights of publicity, the California unfair competition statute, and the federal Lanham Act. The district court granted judgment for him on all causes of action, awarding both compensatory and punitive damages, as well as attorney’s fees and the costs of suit. LAM appealed, and the court of appeals reversed.

This comment analyzes the hybrid nature of the right of

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6. *Tootsie* was a successful 1982 motion picture in which Mr. Hoffman played a male actor who dressed as a woman to get a part on a television soap opera. The photograph published by Los Angeles Magazine was based on a still photograph from the movie showing Mr. Hoffman in character wearing a long-sleeved sequined evening dress and high heels, posing in front of an American flag. See id. at 1182.

7. See *Hoffman I*, 33 F. Supp. 2d at 870.
8. *Id*.
9. See *id*.
10. See *id*.
11. See *id* at 871.
12. See *id*.
13. The common law cause of action for appropriation “may be pleaded by alleging (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness, commercially or otherwise; (3) lack of consent and resulting injury.” *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (1983) (citing WILLIAM PROSSER, LAW OF TORTS § 117, 804-07 (4th ed. 1971)).
17. See *Hoffman I*, 33 F. Supp. 2d at 875.
18. See *Hoffman II*, 255 F.3d 1180, 1189 (9th Cir. 2001).
publicity and the tension between the right of publicity and the First Amendment. Part II examines the evolution of the right to publicity from its birth to the present day as well as its limits and alternatives. Part III identifies the dual nature of the right and explores the confusion that has plagued it for nearly fifty years. Part IV offers an explanation and analysis of the Hoffman I opinion and analyzes and identifies the fallacies in the Hoffman II decision that contributed to the ongoing confusion and lack of understanding surrounding the right of publicity. Finally, Part V proposes a new approach to the right of publicity that would address and incorporate both its property and privacy aspects, provide predictability for future cases, and shed light on this misunderstood right.

II. BACKGROUND

A. Right of Publicity – The Early Years

The right of publicity in California is a subset of the right to privacy comprising four distinct torts, each protecting a plaintiff’s right to be “let alone.” The right of publicity protects a plaintiff against misappropriation of his or her name or likeness for commercial purposes. The other three privacy torts are intrusion upon the plaintiff’s seclusion or solitude, public disclosure of private facts about the plaintiff’s personal life, and publicity that places the plaintiff in a false light in the public eye.

The right of publicity was first recognized in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. In Haelan, the plaintiff ball-player entered into a contract that provided a manufacturer with the exclusive right to use the ball-player’s photograph in connection with its gum sales. The defendant, a rival chewing gum manufacturer, induced the player to enter into a contract, authorizing it to use the player’s photograph to promote the

19. See infra Part II.
20. See infra Part III.
21. See infra Part IV.
22. See infra Part V.
24. See id. at 406.
25. See id.
27. See id. at 867.
THE RIGHT OF PUBLICITY

sales of its gum. The defendant then used the player's photograph without his consent. The Court of Appeals for the Second Circuit recognized a right of publicity in addition to, and independent from, the statutory right to privacy. The right to publicity, protecting the pecuniary value of the plaintiff's identity, is different from the right to privacy protecting a plaintiff from "having his feelings hurt" by a non-consensual publication of his picture. Rather, the right of publicity protects the property interests of prominent people from the unauthorized use of their pictures by advertisers.

In Zacchini v. Scripps-Howard Broadcasting Co., the Supreme Court emphasized the unique nature of the right of publicity as a property right in one's identity, distinct from the other privacy torts. Respondent television station secretly taped and broadcast petitioner's performance. The right of publicity protects petitioner's property interest in his act, and the newscast in which respondent broadcast the entire act was not afforded a constitutional free speech privilege as a defense. The court further held that the right of publicity advances the state interest of preventing unjust enrichment at the expenses of Zacchini whose livelihood may be jeopardized by the unauthorized use of his act or identity. The property aspect inherent in the right of publicity distinguishes it from the other privacy torts and makes it similar to copyright and patent law that protect an individual's

28. See id. at 868.
29. See id.
30. The majority of the court rejected the contention that "a man has no legal interest in the publication of his picture other than his right to privacy, i.e., a personal and non-assignable right not to have his feelings hurt by such a publication." Id.
31. See id. "[I]n addition to and independent of that right to privacy . . . , a man has a right to publicity value of his photograph . . . . Whether it be labeled a 'property' right is immaterial; for here . . . the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." Id.
32. See id.
34. See id. at 573.
35. See id. at 562.
36. See id.
37. See id. "The rationale for [protecting the right to publicity] is straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." Id. at 576 (quoting Harry Kalven, Privacy in Tort Law – Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).
intellectual property. Finally, the Court decided that respondent could not invoke the constitutional free speech privilege defense because the Constitution does not protect the media’s non-consensual broadcast of a performer’s act.

B. The Right of Publicity in California

California courts recognize both common law and statutory rights of publicity, and plaintiffs often bring both causes of action. In White v. Samsung Electronics America, Inc., Samsung created an ad depicting a robot dressed in a wig, gown, and jewelry consciously selected to resemble Vanna White’s hair and dress. The robot was posed next to a game board recognizable as the Wheel of Fortune game show set. The Court of Appeals for the Ninth Circuit found that the fact that the robot was wearing a long gown, blond wig, and jewelry, turning a block letter on a game board, and standing on what appeared to be the Wheel of Fortune set was sufficient to establish a common law right of publicity claim. The broader common law right of publicity “reaches means of appropriation other than name or likeness” and “the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff’s identity.” Finally, Samsung could not take advantage of the parody defense due to the commercial na-

38. See id. “[T]he State’s interest is closely analogous to the goals of patent and copyright law, focusing on the right of individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.” Id. at 573.

39. Zacchini, 433 U.S. at 575. “The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.” Id.

40. See supra note 13.

41. See CAL. CIV. CODE § 3344(a) (West 2003). Section 3344 of the California Civil Code provides, in relevant 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.” Id.


43. See id. at *3.

44. See id.

45. See id. at *12-13. The court rejected the plaintiff’s statutory right of a publicity claim since a robot dressed in a wig, gown, and jewelry was not her likeness under section 3344 of the California Civil Code. See id at *4-5.

46. Id. at *9. “The right to publicity does not require that appropriations of identity be accomplished through particular means to be actionable.” Id.
ture of the advertisement\textsuperscript{47} and because commercial advertising enjoys less First Amendment protection than other forms of speech.\textsuperscript{48}

In \textit{Abdul-Jabbar v. General Motors Corp.},\textsuperscript{49} the Court of Appeals for the Ninth Circuit extended the right of publicity to the unauthorized use of a name previously used by Abdul-Jabbar.\textsuperscript{50} The right of publicity protects the commercial value of a person's name and likeness,\textsuperscript{51} and Abdul-Jabbar has alleged sufficient facts to state a claim under both California common law\textsuperscript{52} and section 3344 of the California Civil Code.\textsuperscript{53} Section 3344 does not require present or current use of a name so long as the name attracts television viewers' attention and allows General Motors to gain commercial advantage.\textsuperscript{54} Finally, the First Amendment "newsworthiness"\textsuperscript{55} defense did not apply because General Motors used Abdul-Jabbar's name "in the context of an automobile advertisement, not in a news or sports account."\textsuperscript{56}

\begin{itemize}
  \item \textsuperscript{47} See \textit{id.} at *19. "Defendants' parody arguments are better addressed to non-commercial parodies. The difference between a 'parody' and a 'knock-off' is the difference between fun and profit." \textit{Id.}
  \item \textsuperscript{48} See \textit{id.} "[E]ven if some forms of expressive activity, such as parody, do rely on identity evocation, the first amendment hurdle will bar most right of publicity actions against those activities." \textit{Id.} "In the case of commercial advertising, however, the first amendment [sic] hurdle is not so high." \textit{Id.} (quoting Cent. Hudson Gas \& Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566, (1980)).
  \item \textsuperscript{49} Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996).
  \item \textsuperscript{50} See \textit{id.} at 409.
  \item \textsuperscript{51} See \textit{id.} at 413. "The so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed and planned, endows the name and likeness of the person involved with commercially exploitable opportunities." \textit{Id.} (quoting Lugosi v. Universal Pictures, 25 Cal. 3d 813, 824 (1979)).
  \item \textsuperscript{52} See Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (1983).
  \item \textsuperscript{53} See CAL. CIV. CODE § 3344(a) (West 2003). The statutory right is limited to particular means of appropriation such as voice, signature, photograph, or likeness. See \textit{id.}
  \item \textsuperscript{54} Abdul-Jabbar, 85 F.3d at 415. "The statute's reference to 'name or likeness' is not limited to present or current use. To the extent GMC's use of the plaintiff's birth name attracted television viewers' attention, GMC gained a commercial advantage." \textit{See id.}
  \item \textsuperscript{55} See generally Namath v. Sports Illustrated, 363 N.Y.S.2d 276 (1975). "Newsworthy" uses are privileged under right of publicity laws. See \textit{id.} Section 3344(d) provides that no prior consent is required for use of a "name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." See CAL. CIV. CODE § 3344(d) (West 2003).
  \item \textsuperscript{56} Abdul-Jabbar, 85 F.3d at 416.
C. Right of Publicity and the First Amendment – A Delicate Balance

An individual’s right of publicity and the media’s First Amendment constitutional right to report on newsworthy events often clash with each other as do their respective interests. While the right of publicity protects an individual’s financial interest in his or her identity, the First Amendment protects the media’s freedom of speech and ability to report without hindrance. The courts are left with the task of resolving the conflict between the two rights in the absence of clear standards.

The seminal case of New York Times Co. v. Sullivan articulated the standard often applicable to the right of publicity.\(^57\) In *Sullivan*, a Montgomery, Alabama city commissioner of public affairs brought a libel action against the New York Times for criticizing his conduct.\(^58\) The United States Supreme Court held that a state cannot award damages to a public official for defamation relating to his official conduct unless he proves that the statement was made with knowledge of its falsity or with reckless disregard for its truth—the standard now known as actual malice.\(^59\) The Times’ First Amendment protection was not defeated because the allegedly libelous statements appeared as part of a paid advertisement.\(^60\) While the statements were printed in what appeared to be a commercial advertisement, the publication went beyond mere advertising and contained information that the First Amendment sought to protect.\(^61\) The Court held that the overwhelming public benefit derived from the media’s discussion of public officials’ conduct far outweighed the minor private inconvenience to the person whose conduct was discussed.\(^62\)

58. See id. at 256.
59. See id at 279-80.
60. See id. at 266.
61. See id. “It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.” Id.
62. See id. at 283.

The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.
In *Dodds v. American Broadcasting Co., Inc.*, the Court of Appeals for the Ninth Circuit concluded that ABC had not acted with actual malice or reckless disregard when it aired a program criticizing official conduct of a judge. The court held that the First Amendment protects journalists who expose misconduct by public officials, and that the high actual malice standard protects the public's right to know about the conduct of elected officials. Finally, the court stated that the "reckless disregard" prong in the actual malice standard requires more than a failure to investigate, but serious doubts on the part of the defendant as to the truth of the publication.

In *Comedy III Productions, Inc. v. Saderup Inc.*, the California Supreme Court had to reconcile the right of publicity and the First Amendment. The defendant artist created a lithograph of "The Three Stooges" and used it to make silk-screened T-shirts. The court recognized the tension between the First Amendment and the right of publicity by highlighting the two distinct purposes of the First Amendment and the goal of the right of publicity—to protect an individual's pecuniary interest in the use of his identity.

The court concluded that while the right of publicity is often classified as a privacy tort, it is more akin to copyright because it protects a form of intellectual property. To enjoy copyright
protection, the work in question must add significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation. Thus, the use of a lithograph to make T-shirts did not contain creative elements, and the right of publicity prevailed.

In Downing v. Abercrombie & Fitch, the Court of Appeals for the Ninth Circuit applied the "newsworthiness" defense in both statutory and common law right of publicity causes of action when surfers sued the company for nonconsensually publishing their photograph, with the identification of their names, for its commercial benefit. The illustrative and essentially commercial use of the surfers' photograph did not contribute significantly to a matter of public interest and the company was not entitled to the First Amendment defense.

D. Limits on First Amendment Protection – Commercial Speech

First Amendment protection is not absolute. The Supreme Court has limited First Amendment protection of commercial speech in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, in which the Court had to determine if

meaning." Id. (quoting Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 CAL. L. REV. 125, 143-45 (1993)).

71. See id. at 399. "The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion." Id. (internal citations omitted).

72. See id. at 391.

73. Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001).

74. See id. at 1001. Under both, the common law and statutory causes of action, "no cause of action will lie for the publication of matters in the public interest . . ." Id. at 997 (quoting Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790, 793 (Ct. App. 1995)). The court also recognized that this defense extends to publications about "people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities." Id. (quoting Eastwood v. Superior Court, 198 Cal. Rptr. 342, 350 (Ct. App. 1983)).


76. See Downing, 265 F.3d at 994.

77. Abercrombie used appellants' photograph essentially as a window-dressing to advance the catalog's surf-theme. The catalog did not explain that appellants were legends of the sport nor did it in any way connect appellants with the story preceding it. Illustrative use of appellants' photograph does not contribute significantly to a matter of the public interest and Abercrombie cannot avail itself of the First Amendment defense. See id. at 1001.

a regulation of the Public Service Commission completely banning promotional advertising by an electrical utility violated the First Amendment. According to the Court, commercial speech is "expression related solely to the economic interest of the speaker and its audience." Because commercial speech proposes a commercial transaction and occurs in an area traditionally subject to governmental regulation, the "Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." The Court held that any limitation on commercial speech that is neither misleading nor related to unlawful activity must be designed to achieve the state's goal in order to be valid. The Court articulated a four-part test that determines whether commercial speech is protected by the First Amendment.

In Bolger v. Youngs Drug Products Corp., the Supreme Court held that a federal law that prevented the unsolicited mailing of information concerning contraceptives was unconstitutional under the First Amendment. The Court reaffirmed that the Constitution affords less protection to commercial speech than

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79. See id. at 558.
81. Id. at 563.
82. See id. at 564.
83. See id. at 566.
85. See id.
to other forms of expression, and that the mailed information fell within the definition of commercial speech: "speech which does 'no more than propose a commercial transaction.'" However, the Court was careful to point out that economic motivation alone does not turn otherwise protected material into commercial speech. Nevertheless, balancing a number of factors, including advertising format, reference to a specific product, and the underlying economic motive of the speaker, the Court concluded that advertisements in question fell within the definition of commercial speech and that discussion of public issues within protected speech does not immunize advertisers who provide false or misleading information to the public.

In Association of National Advertisers v. Lungren, the Court of Appeals for the Ninth Circuit applied intermediate scrutiny to the statute, which governs representation of consumer products as "ozone friendly," "recycled," etc. "The court analyzed the following four factors: (1) whether the speech restricted is devoid of "intrinsic meaning;" (2) the "possibilities for deception;" (3) whether "experience has proved that in fact such advertising is subject to abuse;" and (4) the ability of the intended audience to evaluate the claims made." The court concluded that the statute was subject to intermediate scrutiny because it did not embrace non-commercial messages.

86. See id. at 64-65.
88. See id at 67.
89. See id. at 67-67.
90. "The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning . . . . [A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." Bolger, 463 U.S. at 67-68.
91. See id at 68. "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." Id.
92. Ass'n of Nat'l Advertisers v. Lungren, 44 F.3d 726 (9th Cir. 1994).
94. See Lungren, 44 F.3d at 726.
95. Id. at 731.
97. Intermediate scrutiny requires that the asserted governmental interest be "substantial" rather than "compelling," and that the regulation adopted "directly advances" rather than is "precisely drawn." See Lungren, 44 F.3d at 729 (citations omitted).
inextricably linked with commercial speech.\(^9\)

E. **Limits on the Right of Publicity – Matters of Public Interest**

In *Guglielmi v. Spelling-Goldberg Productions*,\(^9\) the California Supreme Court limited the right of publicity by holding that an heir cannot bring a right of publicity action for a fictionalized account of the decedent’s life.\(^10\) In the case, Rudolph Valentino’s nephew brought an action seeking damages and injunctive relief, claiming that Spelling-Goldberg misappropriated Valentino’s right of publicity when it exhibited a fictionalized film version of his life.\(^10\) The court held that although the film was made for profit, it still enjoyed constitutional protection,\(^10\) stating that the common law right of publicity, inheritable and protected for fifty years after the decedent’s death,\(^10\) did not extend to a fictional film.\(^10\) According to the court, works of fiction are constitutionally protected to the same extent as news stories because they provide commentary on the societies they depict.\(^10\)

F. **Alternatives to the Right of Publicity – Trademarks, Copyright, Parody, and Defenses**

In addition to the right of publicity tort, an individual can use trademark law to protect his or her identity. In *Clark v. America Online*,\(^10\) Dick Clark brought an action for trademark infringement and trademark dilution under the Lanham Act.\(^10\) The District Court for the Central District of California, citing *New Kids on the Block v. News American Publishing*,\(^10\) defined a

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98. See id. at 726.
100. See id at 862.
101. See id at 860.
102. See id. "Whether the activity involves newspaper publication or motion picture production, it does not lose its constitutional protection because it is undertaken for a profit." Id. at 868 (citations omitted).
103. See id. at 864.
104. See Guglielmi, 25 Cal. 3d at 864 (citing Lugosi v. Universal Pictures, 25 Cal. 3d 813 (1979)).
105. See id. at 867. "It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories. Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed." Id.
108. New Kids on the Block v. News Am. Publ’g, 971 F.2d 302 (9th Cir. 1992).
trademark as a "limited property right in a particular word, phrase, or symbol." However, the court noted that "trademark holders do not possess exclusive rights in the use of marks which describe a person, a place, or an attribute of product." Because trademark protection is not absolute, "the 'fair use' defense is available to a defendant whose use of a plaintiff's mark is only 'to describe the goods or services of a party, or their geographic origin.'" The court held America Online is entitled to the nominative fair use defense and that the plaintiffs' trademark claims fail as a matter of law. A plaintiff may bring a copyright infringement action in addition to a right of publicity action if one of the exclusive rights listed in the Copyright Act has been infringed. In Michaels v. Internet Entertainment Group, Inc., the plaintiffs, in addition to the right of publicity, brought a copyright infringement suit to enjoin Internet Entertainment Group from disseminating a videotape depicting them having sexual intercourse. The court rejected the defendants' fair use defense because "the nature of the plaintiffs' copyrighted work is such that the display or

110. Id. at *10 (quoting New Kids on the Block, 971 F.2d at 306).
111. Clark, 2000 U.S. Dist. LEXIS 17368, at *10 (citations omitted). "In essence, the fair use doctrine exempts a party from liability where its use of another party's trademark is not for the purposes of source-identification." Id.

Where the defendant uses a trademark to describe the plaintiff's product, rather than its own, ... a commercial use is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product or service in question must be one not readily identifiable without the use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

112. See id.

113. See id.

114. The Copyright Act grants the owner exclusive rights to reproduce the work, prepare derivative works, distribute copies to the public, to perform the work publicly, and to display the work publicly. See 17 U.S.C. § 106(1)-(5) (2000).
116. See id.

117. In determining whether the use of work falls under the fair use defense, the court will consider factors including, but not limited to: the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. See 17 U.S.C. § 107 (2000).
distribution of images or short segments by [defendant] would destroy the value of the plaintiffs' exclusive rights in the work."\textsuperscript{118} Therefore, the court held that "[s]uch display or distribution . . . cannot constitute fair use."\textsuperscript{119}

In addition to nominative fair use and fair use, defendants have the option of using a parody defense. In \textit{Columbia Pictures Industries, Inc. v. Miramax Films Corp.},\textsuperscript{120} Columbia claimed that Miramax infringed Columbia's copyrighted poster of "Men in Black" by showing people dressed in the outfits worn by the characters of that film.\textsuperscript{121} The District Court for the Central District of California rejected Miramax's parody defense\textsuperscript{122} because the poster served as an advertising vehicle to attract viewers to another film, "The Big One,"\textsuperscript{123} and because advertisements "are entitled to less indulgence than other forms of parody."\textsuperscript{124} Finally, the poster was not a "transformative work which alters the original with new expression, meaning or message," and thus did not qualify as parody.\textsuperscript{125}

G. Hoffman v. Capital Cities/ABC, Inc.

In \textit{Hoffman v. Capital Cities/ABC, Inc. (Hoffman I)},\textsuperscript{126} Los Angeles Magazine (LAM) published a photograph of Dustin Hoffman, without his consent, that LAM had manipulated to merge his photograph with that of a body model wearing designer clothing.\textsuperscript{127} Hoffman brought suit against the magazine based upon the common law,\textsuperscript{128} statutory rights of publicity,\textsuperscript{129}

\textsuperscript{118} Michaels, 5 F. Supp. 2d at 836.

\textsuperscript{119} Id.

\textsuperscript{120} Columbia Indus., Inc. v. Miramax Films Corp., 11 F. Supp. 2d 1179 (C.D. Cal. 1998).

\textsuperscript{121} See id.

\textsuperscript{122} See id. The Supreme Court defined parody as "a use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work." \textit{Id.} at 1187 (quoting \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. 569, 580). The Ninth Circuit has noted that "parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment." \textit{Id.} (quoting \textit{Dr. Seuss Enter. L.P. v. Penguin Books USA, Inc.}, 109 F.3d. 1394, 1400 (9th Cir. 1996)).

\textsuperscript{123} Id. "Defendants' ads seek to use Plaintiffs' ads as a vehicle to entice viewers to see 'The Big One' in the same manner as Plaintiffs used their own ads to entice viewers to see 'Men in Black.'" \textit{Id.} at 1188.

\textsuperscript{124} Columbia Indus., 11 F. Supp. 2d at 1187.

\textsuperscript{125} Id. at 1188.

\textsuperscript{126} Hoffman I, 33 F. Supp. 2d 867.

\textsuperscript{127} See id.

\textsuperscript{128} See id. at 870.
The District Court for the Central District of California awarded Hoffman compensatory and punitive damages, as well as attorney's fees and the costs of suit. The court also rejected LAM's First Amendment defense because "the First Amendment does not protect knowingly false speech." On appeal (Hoffman II), the Court of Appeals for the Ninth Circuit reversed, noting that the commercial aspects of the advertisement were inextricably entwined with its expressive elements, and thus it was protected by the First Amendment. In addition, Hoffman did not demonstrate by clear and convincing evidence that LAM intended to create a false impression in the minds of its readers that they were seeing his body in the photo.

III. IDENTIFICATION OF THE PROBLEM

The right of publicity and the First Amendment almost always clash. However, the apparently opposing goals of the two rights are not solely responsible for the different treatment of the right of publicity by courts. Although the conflict between the right of publicity and the First Amendment is one between private and public interests—between a celebrity's private interest not to have his or her identity exploited by the media for financial gain and the public interest of fostering freedom of expression—the characterization of the tension between the right to publicity in terms of the private-public dichotomy is both misleading and oversimplified.

Confusion in the cases is likely because the right of publicity is misunderstood by the courts: it is a hybrid right and is not easily categorized. Most often it is grouped with other privacy torts that protect a plaintiff's right "to be let alone." However,
the right of publicity is different from other privacy torts\textsuperscript{137} because in addition to protecting the right to be left alone, it protects a distinctly \textit{commercial} interest—the celebrity plaintiff’s ability to earn a living by marketing his or her identity to whomever he or she chooses.

In some respects, the right of publicity is akin to copyright or patent laws, whose goal is to protect an individual’s intellectual property,\textsuperscript{138} because creation of a marketable persona, like creation of a copyrightable or patentable work, is often a result of money, time, energy, and talent.\textsuperscript{139} However, the right of publicity is not entirely a property right since it protects a person’s interest in their identity and one’s identity cannot be characterized merely as property. Thus, the right of publicity is also a mixed right in that it is both a privacy and a property right.

The hybrid and widely misunderstood nature of the right of publicity accounts for the wildly diverse standards used by different courts. The dual nature of the right also accounts for the tendency of many courts to go to extremes in right of publicity cases by subordinating the right of publicity to the First Amendment and vice versa. In the absence of a clear standard governing the right of publicity, the outcome of cases involving right would remain an unpredictable guessing game.

\section*{IV. Analysis}
\textit{\textsuperscript{\textae} A. Hoffman I Claims}

\textbf{1. Common Law Right of Publicity}

In \textit{Hoffman v. Capital Cities/ABC, Inc.},\textsuperscript{140} the district court began its analysis by discussing the plaintiff’s common law right of publicity claim.\textsuperscript{141} The court, after applying the four criteria of the common law right of publicity, concluded that the defendant

\begin{itemize}
\item \textsuperscript{137} The other privacy torts are: intrusion upon the plaintiff’s seclusion or solitude; public disclosure of private facts about the plaintiff’s personal life; and publicity that places the plaintiff in a false light in the public eye. \textit{See id.}
\item \textsuperscript{138} “The right of publicity, at least theoretically, shares this goal [of protecting the creative fruits of intellectual and artistic labor] with copyright law.” Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001).
\item \textsuperscript{139} “Years of labor may be required before one’s skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion.” \textit{Id.} at 399.
\item \textsuperscript{140} \textit{Hoffman I}, 33 F. Supp. 2d at 867.
\item \textsuperscript{141} \textit{See id.}
\end{itemize}
LAM violated the plaintiff's right of publicity. Focusing on the exclusively property aspects of the right of publicity, the court found that the LAM used Hoffman's name and likeness at page 118 of its March 1997 issue; LAM used his name and likeness to its advantage to promote the sales of its magazines, advertise and promote designer clothing; LAM neglected to obtain his consent to use his name or likeness; and Hoffman has suffered injury and damage to his property rights as the result of the unauthorized use. Because the right of publicity is a property right, Hoffman's injury was not the embarrassment of seeing himself wearing a dress but that "he was unable to reap the commercial value or control the use to which his name and likeness were put."  

2. The Statutory Right of Publicity: A Narrower Right

In addition to the common law right of publicity, Hoffman alleged that LAM violated his statutory right of publicity, which protects an individual from nonconsensual use of his or her name, voice, signature, photograph, or likeness for purposes of advertising, selling, or soliciting purchases of products, merchandise, goods, or services. The court held that LAM violated Hoffman's statutory right of publicity when it used his name and likeness in its advertising, because he was injured as a result of the unauthorized use.

3. Lanham Act

The Lanham Act has been frequently invoked in the Ninth Circuit when celebrities' identities have been used without their consent and in a manner which made it appear that they were associated with, sponsoring or endorsing certain activities when, in fact, they were not. The court found that LAM used Hoffman's name and likeness; used it in a manner likely to confuse consumers as to whether he was associated
with, endorsed, or approved the defendant magazine and/or apparel; and that he suffered injury and damages as a result of his inability to benefit commercially or control the use of his name and likeness.150

4. Unfair Competition

Finally, the court held LAM's actions constituted unfair competition151 because: (1) LAM used the Hoffman's name and likeness in an unlawful, unfair, or fraudulent manner; (2) LAM used his name and likeness in a manner constituting unfair, deceptive, untrue, or misleading advertising; and (3) Hoffman was injured and suffered damages and a result of LAM's conduct.152

B. Hoffman I Defenses

1. First Amendment

The court rejected LAM's First Amendment defense because of its exploitative and commercial use of Hoffman's name and likeness.153 LAM did not provide any commentary on fashion trends or any coordinated or unified view of current fashions; nor did the article address the popularity of certain colors or styles.154 In addition, the article used celebrity models without their consent to attract attention to the designer clothing, rather than to deliver any specific message.155

The defense was also inapplicable because the First Amendment does not protect knowingly false speech,156 and LAM knew that Hoffman "has never worn the designer clothes he was depicted in. Moreover, LAM admitted that they intended to create the false impression in the minds of the public 'that they were seeing Hoffman's body.'"157 Finally, the court held that LAM could not invoke the First Amendment defense for public policy reasons: the use of digital technology makes it easy to violate the right of publicity and thus "allowing this type

151. Unfair competition in California is defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." CAL. BUS. & PROF. CODE § 17200 (2003).
152. See Hoffman I, 33 F. Supp. 2d at 874.
153. See id.
154. See id.
155. See id. at 874-75.
of deceptive conduct to continue would lead to further technological mischief."\textsuperscript{158}

2. The "News" or "Public Affairs" Defense

The court found the "news" or "public affairs"\textsuperscript{159} defense inapplicable because LAM's article was not a presentation of fashion news and affairs, and because the clothes selected were not unified by a particular theme or point of view on fashion.\textsuperscript{160} In fact, the article did not contain any news of Hoffman's own clothing preferences since he never actually wore the clothing in which he was depicted.\textsuperscript{161} Finally, even if the article was a bona fide news or public affairs report, this use fails because this defense is a limited one. According to the court, the "right of publicity permits the use of a person's likeness only to the limited extent reasonably required to convey the news to the public."\textsuperscript{162} Since "no part of Hoffman's likeness was reasonably required to convey what [LAM] claimed was the newsworthy aspect of its article,"\textsuperscript{163} it could not meet this limitation.

3. Preemption

Hoffman's right of publicity claim was not preempted by the Copyright Act.\textsuperscript{164} First, his name and likeness did not fall within the subject matter of copyright,\textsuperscript{165} and second, the right of publicity cause of action was not equivalent to the rights protected by the Copyright Act\textsuperscript{166} and subject matter at issue in-

\textsuperscript{158} Id. at 873.

\textsuperscript{159} See id. Section 3344(d) provides that no prior consent is required for use of a "name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." CAL. CIV. CODE § 3344(d) (West 2003).

\textsuperscript{160} See Hoffman I, 33 F. Supp. 2d at 875.

\textsuperscript{161} See id.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Section 301 of the Copyright Act provides a two-part test for preemption: first the work at issue must fall within the copyright subject matter, and second the rights granted under state law must be equivalent to any of the exclusive rights within the general scope of the copyright. See 17 U.S.C.S. § 301 (2003).

\textsuperscript{165} The Copyright Act sections 102 and 103, respectively, provide copyright protection for original works of authorship fixed in any tangible medium of expression (including literary, pictorial, graphic, and sculptural works), and to compilations and derivative works utilizing material protected under Section 102 of the Act. See 17 U.S.C.S. §§ 102-103 (2003).

\textsuperscript{166} The exclusive rights protected by the Copyright Act include the rights to do and authorize the reproduction, distribution, public performance and display of
volved elements different in kind from those in a copyright infringement case.\textsuperscript{167}

4. *Lanham Act Fair Use*

The court rejected the fair use defense under the Lanham Act, holding that LAM's use of Hoffman's likeness was not merely descriptive.\textsuperscript{168} Rather, the court concluded that the use suggested his sponsorship and endorsement of LAM, and the designer clothes he appeared to be wearing in the photograph.\textsuperscript{169}

C. Hoffman II

On appeal,\textsuperscript{170} the Ninth Circuit reversed. The court concluded that Hoffman's photograph was entitled to First Amendment protection, that the article in which the photograph appeared was not purely commercial speech, and that Hoffman failed to meet the actual malice standard.\textsuperscript{171}

1. *First Amendment*

Unlike the district court, the Ninth Circuit Court of Appeals accepted LAM's First Amendment defense. According to the court, there is "no First Amendment defense to a California right of publicity claim when 'artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain.'"\textsuperscript{172} However, the court noted that an artist who added "significant transformative elements" to depiction could still evoke First Amendment protection.\textsuperscript{173} The court of appeals believed that the photograph in LAM met this requirement because it substituted a model's body for Hoffman's.\textsuperscript{174} Thus, it was protected by the First Amendment.\textsuperscript{175}

2. *Commercial Speech*

The court also rejected the district court's finding that the

\textsuperscript{167} See Hoffman I, 33 F.2d at 875.
\textsuperscript{168} See id. at 875.
\textsuperscript{169} See id.
\textsuperscript{170} See Hoffman II., 255 F.3d 1180, 1184 (9th Cir. 2001).
\textsuperscript{171} See id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. (quoting Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797, 815 (Cal. 2001)).
\textsuperscript{174} See id.
\textsuperscript{175} See id.
photograph was purely commercial speech\textsuperscript{176} that "does no more than propose a commercial transaction,"\textsuperscript{177} and thus "does not receive the same level of constitutional protection as other types of protected expression."\textsuperscript{178} The court found that the photograph in question did not fit the definition of pure commercial speech because the article in which it appeared was not a traditional advertisement designed solely to sell a product; did not advance a commercial message; and was a combination of humor, fashion photography, and comment on classic films and famous actors.\textsuperscript{179} The court held that any commercial aspects of the article were inextricably intertwined with its expressive elements, thus warranting First Amendment protection.\textsuperscript{180} Finally, the court found that although the article was meant to attract attention and ultimately sell the magazine, that purpose alone did not make the article commercial speech or deprive it of First Amendment protection.\textsuperscript{181}

3. Actual Malice

The court of appeals reversed the district court's finding that LAM acted with actual malice.\textsuperscript{182} Since the article in which the photograph appeared was more than pure commercial speech, Hoffman had to prove that LAM acted with "reckless disregard for the truth" or a "high degree of awareness of probable falsity" to prevail.\textsuperscript{183}

To meet the actual malice standard, Hoffman had to demonstrate, by clear and convincing evidence, that "LAM intended to create the false impression in the minds of its readers that when they saw the altered 'Tootsie' photograph they were seeing Hoffman's body."\textsuperscript{184} "Mere negligence is not enough to demonstrate actual malice."\textsuperscript{185} To determine LAM's intent, the

\begin{itemize}
  \item \textsuperscript{176} See Hoffman II, 255 F.3d at 1184.
  \item \textsuperscript{177} Id. (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983)).
  \item \textsuperscript{178} 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 498 (1996).
  \item \textsuperscript{179} See Hoffman II, 255 F.3d at 1185.
  \item \textsuperscript{180} See id. (citations omitted).
  \item \textsuperscript{181} See id. at 1186; cf. Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1197-98 (9th Cir. 1989) (holding that although defendant may have published the feature solely or primarily to increase circulation and profits, that does not make the article purely commercial or for purposes of advertising).
  \item \textsuperscript{182} See Hoffman II, 255 F.3d at 1189.
  \item \textsuperscript{183} Id. (quoting Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989)).
  \item \textsuperscript{184} Id. at 1187.
  \item \textsuperscript{185} Id. (citing Dodds v. American Broad. Co., 145 F.3d 1053, 1063 (9th Cir. 1998)).
\end{itemize}
court looked at the totality of LAM’s presentation to determine if it would inform the average reader that the body in the photograph was not Hoffman’s. Because LAM’s table of contents explicitly mentioned that the pictures used were digitally altered and the majority of the featured actors were deceased, the totality of LAM’s presentation did not so inform the reader. Thus, the court found that Hoffman did not provide clear and convincing evidence that the editors intended to mislead the readers into believing that they were seeing Hoffman’s body in the photograph.

D. Analysis

The Ninth Circuit’s departure from, and complete reversal of, the district court’s opinion illustrates the extent to which the right of publicity is misunderstood. While the district court treated the right exclusively as a property right, the court of appeals limited Hoffman’s right of publicity by extending First Amendment protection to nonconsensual use of his name and likeness.

1. The First Amendment and Literal Falsity

According to the balancing test formulated in Comedy III Productions, Inc. v. Saderup, Inc., there is no First Amendment defense to a California right of publicity when “artistic expression takes the form of literal depiction or imitation of a celebrity for a commercial gain,” but an artist who “added significant transformative elements” could still invoke First Amendment protection. Here, the digitally-altered photograph was transformative enough to warrant First Amendment protection because LAM substituted a new body in place of Hoffman’s.

In addition, Hoffman’s case was based on the photograph

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186. See id.
187. See id. at 1187-88.
188. See Hoffman II, 255 F.3d at 1188-89. The court also relied on the style editor’s explanation of her earlier testimony that she “did not intend to convey to readers that Hoffman had participated... in the article’s preparation, and never thought that readers would believe Hoffman posed for the photograph in the new dress.” Id.
190. See Hoffman II, 255 F.3d at 1186.
192. See id.
being a false portrayal of him.\footnote{\textit{See} \textit{id}.} Logically then, his claim must fail: if something is false, it is per se transformative and cannot be "a literal depiction or imitation of celebrity."\footnote{Comedy III Prods., 21 P.3d at 808.} However, the court failed to realize that the photograph could be transformative and be a literal depiction of Hoffman at the same time. In fact, in this case, it was necessary that it be both: LAM could not legally have used the original still photo wherein Hoffman wore the original red dress. On the other hand, LAM could not transform the photograph beyond the point of recognition as a \textit{Tootsie} "look alike" without nullifying the effect the film's popularity upon readers. Thus, the mixture of literal depiction and falsity was crucial to the photograph's desired effect.

The different dresses that he wore in the original \textit{Tootsie} still and in the altered photograph should not have been significant enough transformative elements necessary to invoke First Amendment protection, as the dress substitution changes the original still too slightly to be called "significant." However, focusing only on the superficial transformative elements of the altered photograph, the court ignored the fact that LAM had to minimally alter the original still by adding a different dress and shoes, to make the photograph useable in the article.

In fact, the different dresses and shoes were the only differences between the original and altered photographs. The court overlooked the photo's more substantial literal elements, and extended First Amendment protection to something that was essentially a copy of a famous movie still. For example, LAM retained Hoffman's head and the American Flag.\footnote{\textit{See Hoffman II}, 255 F.3d at 1183.} In doing so, LAM intended to superficially alter the original photograph only to the extent necessary to change the original clothing in the photograph while at the same time exploiting and retaining the popularity and spirit of \textit{Tootsie}. Such minor alterations should not be transformative enough to warrant First Amendment protection.

Finally, the court ignored the possibility that something may be both false and literal depiction of a celebrity and fall outside First Amendment protection. The LAM photograph is a perfect example of such literal falsity—it retained the spirit of the original \textit{Tootsie} photograph but at the same time digitally al-
tered it to make it usable by the magazine.

2. Commercial Speech

The Ninth Circuit concluded that the article in question did not constitute commercial speech because it did no more than "propose[d] a commercial transaction." LAM did not receive any consideration from the designers whose clothing was featured in the "Tootsie" or other photographs, and the context in which Hoffman's image was used did not suggest a traditional advertisement printed solely to sell a particular product. Rather, the article appeared in an issue focusing on Hollywood past and present, and "viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors."

In its conclusion, the court departed from Bolger v. Youngs Drug Products Corp., which recognized that "a company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitution protection when such statements are made in the context of commercial transaction." The Court's reasoning in Bolger is especially applicable to LAM, which as a magazine enjoys First Amendment protection. LAM's article thus should fall within the definition of commercial speech because its purpose is to attract attention to a magazine. The fact that LAM did not receive consideration from the designers whose clothing it featured is irrelevant because LAM could have used the clothing in the article without the designers' permission. There is also a reason why LAM chose to use scenes from famous films featuring well-known actors—to attract attention to itself; the use of less famous films or unknown actors would not have been as effective.

Further, there is no evidence that the article contained either fashion photography or editorial comment on films or actors. The article consisted of previously taken photographs digitally

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197. Id. at 1185 (quoting Newcombe v. Adolf Coors Co., 157 F.3d 686, 691 (9th Cir. 1996)).
198. See id.
199. Id.
201. See id. at 68. "For commercial speech [to receive First Amendment protection], it... must concern lawful activity and not be misleading." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566. (1980)). It is obvious, however, that the article concerns a lawful activity.
altered to appear that the actors depicted were wearing current designer clothing.\textsuperscript{202} The photographs were not taken by nor were the clothes or shoes featured designed by the editors of LAM, instead, the photographs were superficially altered to attract attention to the magazine.\textsuperscript{203} Nor was there evidence of any editorial comment by the magazine on the films or actors featured: the captions below the photographs simply described their content without adding anything that could be interpreted as comment.\textsuperscript{204} In short, the article in general and the \textit{Tootsie} photograph in particular lack expressive or transformative elements and are purely commercial speech. Finally, they are misleading in that they suggest that Hoffman permitted LAM to publish his picture, which he did not, and thus is not protected by the First Amendment.\textsuperscript{205}

3. \textit{Actual Malice}

The Ninth Circuit held that because the "Tootsie" photograph was not commercial speech, Hoffman, a public figure, must meet the actual malice standard to defeat LAM's First Amendment protection.\textsuperscript{206} The court, looking at the totality of LAM's presentation, concluded that Hoffman did not present clear and convincing evidence that LAM intended to mislead readers into believing they were seeing his body in the altered "Tootsie" photograph.\textsuperscript{207} The actual malice standard required him to prove that "LAM acted with 'reckless disregard for the truth' or a 'high degree of awareness of probable falsity.'"\textsuperscript{208} Because he did not give his permission to LAM to either use or alter the "Tootsie" photograph and LAM knew it, Hoffman provided enough evidence not only to show that LAM acted with actual malice but that it intended to deceive the public into thinking that he gave it permission to use his photograph. Hoffman also failed to present clear and convincing evidence that the photograph would mislead LAM's readers into thinking

\textsuperscript{202} See Hoffman II, 255 F.3d at 1183.
\textsuperscript{203} See id.
\textsuperscript{204} See id. at 1187.
\textsuperscript{205} See id.
\textsuperscript{206} See id. at 1186 (citing Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989)).
\textsuperscript{207} See id. at 1189.
\textsuperscript{208} Hoffman II, 255 F.3d at 1186 (quoting Harte-Hanks Communications, 491 U.S. at 667).
that the body in the altered photograph was his. However, it is irrelevant whose body the public thought they were seeing. Hoffman’s right of publicity was violated when LAM printed his photograph without his consent.

The court conceded, however, that LAM allowed its readers to compare the original and the altered photographs by providing both versions and this comparison did not alert the reader that Hoffman did not participate in the alteration. But printing both versions, in which Hoffman’s pose is the same, suggests that he posed for the second photograph and is only bound to mislead readers that he in fact did so. LAM must have known that after seeing both photographs its readers would think that they were seeing Hoffman’s body in the altered still, thus satisfying the requirement that LAM act with a “high degree of awareness of probable falsity” in publishing Hoffman’s photograph.

The totality of LAM’s presentation was equally irrelevant. The article consisted of over a dozen photographs of different actors, both living and dead. The fact that the majority of the actors were deceased and thus could not pose for the photographs had nothing to do with LAM printing Hoffman’s photograph without his permission. Further, LAM could have violated the featured actors’ rights of publicity in addition to Hoffman’s. His right of publicity is independent from everybody else’s, and even if LAM asked for permission from the other featured actors, that does not abrogate or alter Hoffman’s own rights in any way. Thus, the court’s conclusion that “the totality of LAM’s presentation of the article and the ‘Tootsie’ photograph [does not provide] clear and convincing evidence that the editors intended to suggest that [readers were] seeing Hoffman’s body on the altered . . . photograph” is unconvincing and erroneous since the photographs in the article are independent of each other as are the rights of the featured actors. Thus, the only totality the court should have examined was the totality of the altered Tootsie still, which did not alert the readers that Hoffman did not pose for it or even permitted LAM to use his face in the article. That totality mislead LAM’s readers into thinking that the body they saw was his and that he granted LAM permission to use his

209. See id. at 1188.
210. See id. at 1187.
211. Id. at 1186 (quoting Harte-Hanks Communications, 491 U.S. at 667).
212. Id. at 1188.
face, thus satisfying the requirements of actual malice. The totality of the whole article is irrelevant since each photograph represents the independent rights of the individual featured actors.

V. PROPOSAL

The Hoffman I and Hoffman II decisions illustrate the confusion that permeates the right of publicity and the courts' misunderstanding of the right's hybrid nature. While the Hoffman I court saw the right of publicity as predominantly a property right, the Hoffman II court treated it as a privacy right, subject to a high level of First Amendment protection. However, both courts went to the extreme in their treatment of the right of publicity and contributed to the continued confusion and misunderstanding of the right and to further unpredictability in this area of the law. Because the right to publicity is a hybrid right, and is at the same time a property and a privacy right, the applicable legal test should protect both its intellectual property and privacy aspects. In deciding future right-of-publicity cases in California, the courts should retain the present common law and statutory rights of publicity, as well as the exception for "news" or "public affairs" use found in section 3344(d) of the California Civil Code.

Because the right of publicity is also protected by copyright and trademark laws, the courts should incorporate the elements of those laws such as the first element of the copyright fair use defense—the purpose and nature of the use, including whether the intended use is commercial. The courts should also use a modified version of the trademark nominative fair use defense. That is, in order to be protected, a commercial use of the plaintiff's identity must be reasonably necessary to convey information or news to the public and the user must do nothing that in conjunction with the plaintiff's identity suggest sponsorship or endorsement by the plaintiff of the product or service advertised. The courts should also retain both the parody defense and the actual malice standard, but the latter should only

213. See Eastwood, 198 Cal. Rptr. at 347 (citing PROSSER, LAW OF TORTS § 17, at 804-07 (4th ed. 1971)).
214. See CAL. CIV. CODE § 3344 (West 2003).
215. See id.
be used when the defendant’s use is newsworthy and not for commercial gain alone and would fall under the first factor of the copyright fair use defense.

Thus, the proposed test would be a combination of the existing common law and statutory rights of publicity. It would include the purpose and nature of use (if the use is noncommercial and falls under the news and public affairs exception, the plaintiff must prove actual malice on the part of the defendant, the defendant will also be able to plead the parody defense under this factor), whether the use of the plaintiff’s identity was reasonably necessary to convey the information, and whether the defendant’s use of the plaintiff’s identity suggests the latter’s sponsorship or endorsement. This test would reduce much of the current confusion surrounding the right of publicity and provide predictability in the outcome of right of publicity cases. It would also protect both future plaintiffs’ pecuniary interests in their identities and future defendants’ freedom of speech by applying a combination of factors of equal importance.

VI. CONCLUSION

Hoffman I and Hoffman II illustrate the confusion surrounding the right to publicity. The Hoffman I court treated the right as essentially and exclusively a property right protecting Mr. Hoffman’s pecuniary interest in his identity. The Hoffman II court, on the other hand, treated it as a privacy right and ignored its property aspects, reversing the holding of the district court and upsetting the delicate balance between the right of publicity and the First Amendment. The conflicting holdings of the two courts illustrate just how misunderstood the right to publicity really is and underscore the need for a clearer standard which would provide some predictability in right-of-publicity cases. Both courts sought to classify the right as either a property or a privacy right and both failed to recognize that the right of publicity is a hybrid right protecting a plaintiff’s pecuniary interest in his identity and the media’s freedom of speech at the same time.

Because of the hybrid nature of the right of publicity, the new legal test should incorporate both of its aspects. In addition to the existing common law and statutory rights of publicity, it would include the purpose and nature of use of the plaintiff’s identity. Next, the test would address whether the use of the plaintiff’s identity was reasonably necessary, and whether the
defendant's use of the plaintiff's identity suggests the latter's sponsorship or endorsement. This test would reduce much of the current confusion surrounding the right of publicity and provide much-needed predictability in the outcome of right of publicity cases.