The Power to Control Identity: Limiting a Celebrity's Right to Publicity

Todd J. Rahimi

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
THE POWER TO CONTROL IDENTITY:
LIMITING A CELEBRITY'S RIGHT TO
PUBLICITY

I. INTRODUCTION

In a recent series of television commercials, tennis star Andre Agassi says that "Image is everything." Most celebrities would probably agree with this statement, along with the notion that nothing is more important than the right to control their image. In California, as in a vast majority of jurisdictions, the ability to control one's image is accomplished by protecting against the commercial appropriation of one's identity. Courts and commentators have differed as to whether this legal protection falls under a theory of "privacy," "property," or "publicity," but all agree that the interest exists and deserves protection.

As the influence of the media grows increasingly pervasive in society, however, the question of how to protect this interest becomes more troublesome. Traditionally, California cases involving the right to publicity have stated that an unlawful appropriation of the right requires the use of name or likeness. A recent case, White v. Samsung Elecs. America, Inc., extends California law in this area to an unknown ex-


2. See discussion infra parts II.A, II.B, II.C, II.D, II.E, II.F, III.B.1, III.B.2.

3. This commercial interest in identity has been characterized as a privacy right, a property right, or a publicity right. See, e.g., Republic Pictures Corp. v. Rogers, 213 F.2d 662, 665-66 (9th Cir. 1954) (holding that reproductions of the "name, voice, and likeness" of a performer have value due to the performer's notoriety and public following); Carson v. Here's Johnny Portable Toilets, 698 F.2d 831, 835 (6th Cir. 1983) ("The right of publicity has developed to protect the commercial interest of celebrities in their identities."); Williams v. Weisser, 78 Cal. Rptr. 542 (1969) (allowing a university professor to prevail in a suit for invasion of privacy when his class notes were published by the defendant without the professor's consent but under the professor's name).

For the purposes of this comment, the commercial interest in one's identity will be referred to as the right to publicity.

4. See infra note 113.

5. 971 F.2d 1395 (9th Cir. 1992), reh'g denied, 989 F.2d 1512 (1993).
tent by holding that actionable appropriations include a plaintiff's "identity" as well as those of name or likeness.

This comment explores the court's ruling in White, first providing a background explaining White in light of prior case law concerning the right of publicity. Through an analysis of the decision, the comment determines that a broad right of publicity, one which extends to anything evoking someone's identity, could seriously burden creativity. Concluding that the right of publicity will not be "eviscerated" by a narrower right, the comment proposes the adoption of more traditional limitations and exceptions which will prevent the White decision from diminishing the rights of copyright holders and the public at large.

II. BACKGROUND

A. Dean Prosser: Early Formulation of the Right to Publicity

Dean Prosser articulated one of the earliest formulations of the right to publicity. In his article, Prosser delineated four types of invasions that violate the right to privacy: "(1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness." The fourth category, although initially articulated as a privacy interest, describes what has come to be known as the right to publicity. Explaining his formulation of this

6. See discussion infra part II.
7. See discussion infra part III.
8. See discussion infra part III.C.
9. See discussion infra part III.C.
10. See discussion infra part IV.
11. See discussion infra parts III.C, IV.
14. See, e.g., White, 971 F.2d at 1398 n.1 ("Under Professor Prosser's scheme, the right of publicity is the last of the four categories of the right to privacy."); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) ("Henceforth we will refer to Prosser's last, or fourth, category,
category, Prosser stated that it must first be determined whether the defendant appropriated an aspect of the plaintiff's identity.\textsuperscript{16} If the plaintiff is identified, the defendant still must be determined to have committed the appropriation for his own advantage.\textsuperscript{16}

Prosser's formulation of the right of publicity focused on appropriations of name or likeness,\textsuperscript{17} but he acknowledged in a footnote that "[i]t is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or likeness, and that this would be an invasion of his right of privacy."\textsuperscript{18} He immediately noted, however, that "no such case appears to have arisen."\textsuperscript{19}

B. Statutory Adoption of the Right to Privacy

According to the Supreme Court of California, "[i]tem 4 of Dean Prosser's classification of invasions of privacy has been complemented legislatively by Civil Code section 3344 . . . ."\textsuperscript{20} The statute reads in pertinent part: Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, . . . for the 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.\textsuperscript{21}

\textsuperscript{15} Prosser, supra note 12, at 403. In his discussion of appropriations, Prosser provided two examples which proved useful to the analysis of later cases. In one, he stated that publishing a picture of a plaintiff's automobile with nothing to indicate who owns the car does not constitute an appropriation. \textit{Id.} at 404-05. In the other, he claimed there was no liability for basing a fictional character on a plaintiff's character, occupation, or the general outline of his career. \textit{Id.} at 405.

\textsuperscript{16} \textit{Id.} at 405.

\textsuperscript{17} \textit{Id} at 401-05.

\textsuperscript{18} Prosser, supra note 12, at 401 n.155.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} Lugosi v. Universal Pictures, 603 P.2d 425, 428 n.6 (Cal. 1979).

\textsuperscript{21} CAL. CIV. CODE § 3344 (West Supp. 1994).
C. Eastwood v. Superior Court: Interpretation by California Courts of the Common Law Right of Publicity

In Eastwood, a weekly newspaper published a picture of plaintiff and singer Tanya Tucker above the caption "Clint Eastwood in Love Triangle." The newspaper also aired television advertisements featuring Eastwood's name and photograph. The California Court of Appeal stated that the common law right of publicity action "may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's name or likeness to the defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." Since there had been unauthorized use of the plaintiff's name and photograph, the court concluded that the newspaper had infringed both his common law right of publicity and Civil Code section 3344.

D. Federal Cases and the Right of Publicity

A recent series of circuit court cases has departed from a rigid name or likeness analysis in construing the California common law right of publicity. In Motschenbacher v. R.J. Reynolds Tobacco Co., the defendant used a picture of the plaintiff's race car in its cigarette advertisements. Plaintiff Motschenbacher, a professional racing car driver, had "individualized" his cars to make them easily recognizable as his own. The distinctive features of his car included an oval white background for his racing number and a narrow white

23. Id. at 345.
24. Id.
25. Id. at 347 (citation omitted). This description of the common law right to publicity retains the name and likeness formulation. The court supported Lugosi's statement regarding the right to publicity and Civil Code section 3344, stating:

The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law.

Id. at 346 n.6 (citation omitted).
27. 498 F.2d 821 (9th Cir. 1974).
28. Id.
29. Id. at 822.
pinstripe on the leading edge of the car. These markings differed from the markings on all other racing cars.

In the advertisement, the defendant altered the picture by changing the number of Motschenbacher's car and adding a spoiler which contained the name of the defendant's product. Despite the defendant's alterations, the distinctive characteristics of the plaintiff's car remained. Furthermore, the plaintiff was driving the car in the picture, but his facial features were not visible.

Even though the plaintiff's name was not used and his likeness was unrecognizable—and therefore neither had been appropriated—the court held that the plaintiff's California right of publicity claim should reach the jury. The court stated that "the car under consideration clearly has a driver and displays several uniquely distinguishing features" so that people would "think the car in question was [the] plaintiff's and . . . infer that the person driving the car was the plaintiff."

In Midler v. Ford Motor Co., the Ninth Circuit continued to expand the common law right of publicity. In Midler, the defendant aired a commercial in which a "sound-alike" sang one of Plaintiff Midler's famous songs. Plaintiff is an actress and singer who has been described as an "outrageously original singer/comedian." The defendant wanted Midler to sing in the commercial herself, but failed to per-

30. Id.
31. Id.
32. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822 (9th Cir. 1974). The court described a spoiler as a "wing-like device." Id.
33. Id.
34. Id.
35. Id. at 825-26. As stated earlier, no complete agreement exists as to how to characterize this right. See supra note 3 and accompanying text. Even though the court refused to decide whether to protect the plaintiff's interest "under the rubric of 'privacy,' 'property,' or 'publicity,'" it is important to note that the court protected an interest in identity where a name or likeness had not been appropriated. Motschenbacher, 498 F.2d at 825-27.
36. Id.
38. 849 F.2d 460 (9th Cir. 1988).
39. Id. at 461-62. The song imitated was Midler's "Do You Want to Dance." Id.
40. Id. at 461 (citation omitted).
suade her to do so. Instead, the defendant hired one of the plaintiff's backup singers, and instructed her to "sound as much as possible like the Midler record." According to many people, the voice in the commercial "sounded exactly" like the plaintiff's voice.

The defendant had not used Midler's name or likeness in the commercial, but the court nevertheless held that the plaintiff had stated a claim under the California common law right of publicity. The court reasoned that by using a sound-alike, the defendants "convey[ed] the impression that Midler was singing for them" and therefore "for their own profit in selling their product did appropriate part of her identity." In Carson v. Here's Johnny Portable Toilets, Inc., the Ninth Circuit again allowed recovery without proof that the defendant appropriated the plaintiff's name or likeness. In Carson, the defendant used plaintiff Johnny Carson's introductory slogan to promote its portable toilets. Carson had been introduced with the phrase "Here's Johnny" ever since he began hosting "The Tonight Show" in 1962, and the phrase had been used in connection with Carson as far back as 1957. Accordingly, the court recognized the twenty-five year old connection and proclaimed that the phrase "is generally associated with Carson by a substantial segment of the television viewing public."

In promoting its portable toilets, the defendant combined the well-known introduction with another expression, "The World's Foremost Comedian," in order to make "a good play

41. Id. Apparently, Young & Rubicam, the defendant's advertising agency, contacted Jerry Edelstein, the plaintiff's manager, and the conversation took place as follows: "Hello, I am Craig Hazen from Young and Rubicam. I am calling you to find out if Bette Midler would be interested in doing . . . ?" Edelstein: 'Is it a commercial?' [Hazen:] 'Yes.' Edelstein: 'We are not interested.' "Id.
42. Id.
43. Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).
44. Id. at 463.
45. Id.
46. Id. at 463-64.
48. Id. at 832.
49. Id.
50. Id. at 832-33.
on the phrase.\textsuperscript{51} The court called the name or likeness formulation of the right of publicity "too narrow,"\textsuperscript{52} and held that "Carson's identity may be exploited even if his name . . . or his picture is not used."\textsuperscript{53}

E. Policy Considerations Underlying the Right of Publicity

In a recent law review article,\textsuperscript{54} Michael T. Madow analyzes celebrities' moral interests in relation to their right of publicity and concludes that these interests are not as compelling as some might claim.\textsuperscript{55}

1. The Labor Theory: Can a Celebrity Create a Marketable Identity?

According to Madow, the most frequently advanced contention in support of the right to control one's identity consists of a moral argument based on a labor theory.\textsuperscript{56} Under this theory, a famous identity is viewed as a celebrity's product, something created through individual labor.\textsuperscript{57} Madow argues, however, that celebrities do not create commercially exploitable identities in the manner traditionally suggested by the term "create."\textsuperscript{58} He calls it a "fundamental misconception of the processes by which fame is generated and public images are formed in contemporary society."\textsuperscript{59} This is true because fame is a "relational" phenomenon, a status bestowed by others.\textsuperscript{60} Madow suggests that the reason one person achieves widespread acclaim, and another does not, may have less to do with accomplishment or merit than with the needs and interests of society.\textsuperscript{61} Despite a celebrity's "labor" to create and maintain a perfect public image, including the hiring of a powerful agency to monitor that image and supply him with advice during his career, a celebrity simply cannot

\textsuperscript{51} Id. at 834.
\textsuperscript{52} Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983).
\textsuperscript{53} Id.
\textsuperscript{55} Id. at 179.
\textsuperscript{56} Id. at 181.
\textsuperscript{57} Id. at 182.
\textsuperscript{58} Id. at 184.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 188 (citation omitted).
\textsuperscript{61} Id. at 195.
create his identity or control its "meaning" exactly and exclusively in the manner he desires.62

Madow's criticism of a carpenter analogy proves quite helpful in illustrating this point.63 He states that a celebrity does not make his identity in the same way that a carpenter makes a chair.64 Although a carpenter responds to public demand as to the type of chair he should make, he makes and polishes it himself, then places it on the market.65 In the entertainment industry, however, the public participates "directly and actively in the meaning-making process."66

2. The Unjust Enrichment Theory: Are Celebrities Being Exploited?

Madow also identifies a reluctance by courts and commentators to allow unjust enrichment on the part of the defendants in right of publicity actions.67 He argues, however, that celebrities are actually receiving a windfall themselves.68

The very idea of unjust enrichment stems from the fact that the alleged appropriator has made use of the original "labor" of someone else while not contributing to the creation of the identity.69 Madow maintains that this "reaping where one has not sown"70 analysis is deficient in two ways. First, it

62. Id. at 191-92.
63. Id. at 183 (citing Eileen R. Reilly, Note, The Right of Publicity for Political Figures: Martin Luther King, Jr., Center for Social Change, Inc. v. Am. Heritage Products, 46 U. Prrr. L. Rsv. 1161, 1168 n.37 (1985)). Madow criticizes Reilly's analogy, described as follows:
A carpenter begins with a virtually worthless piece of wood. Through a combination of hard work, time, and skill, he converts it into a beautiful chair. He now has a thing of value where none existed before. Similarly, a celebrity begins as an unknown. He has no publicity value. Through the investment of many years of hard work, he makes his name and face marketable. Like the carpenter, he has created a valuable asset where none existed before.
Madow, supra note 54, at 183.
64. Madow, supra note 54, at 195.
65. Id. at 194.
66. Id.
67. Id. at 196. He points out that defendants accused of appropriation are described as "poachers," "parasites," "pirates," or "free riders." Id. at 196. In Midler, the majority noted that "[t]he district court described the defendants' conduct as that 'of the average thief.'" Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).
68. Madow, supra note 54, at 196-99.
69. Id. at 200.
70. Id. at 204.
fails to recognize that celebrities and entertainers "borrow" liberally from their predecessors.\textsuperscript{71} Oftentimes, contemporary products can be said to contain nothing more than a creative contribution because they lean so heavily on the work and talents of previous artists.\textsuperscript{72} As Madow frames the issue, there is a very real question of how much entertainers have "‘invented' and how much [they have] 'converted.'"\textsuperscript{73}

Second, Madow points out that the unjust enrichment theory assumes that "appropriators" exercise no creativity of their own.\textsuperscript{74} Although such blatant appropriations do occur, they require no effort on the part of the appropriator and are relatively easy to spot.\textsuperscript{75} According to Madow, however, it is more likely that an unauthorized commercial appropriator has done some "sowing" of his own.\textsuperscript{76}

F. The Main Case: White v. Samsung Elecs. America, Inc.\textsuperscript{77}

1. The Facts

Vanna White hosts the television game show Wheel of Fortune.\textsuperscript{78} On the show, White stands next to a board with lighted revolving blocks.\textsuperscript{79} Each block has a letter on it, and together the blocks form names or phrases that remain hidden from the audience and the game participants.\textsuperscript{80} When the participants correctly guess the individual letters, White

\textsuperscript{71.} Id. at 197.
\textsuperscript{72.} Id.
\textsuperscript{73.} Id. (citation omitted).
\textsuperscript{74.} Id. at 200.
\textsuperscript{75.} For example, imagine a person does not have the consent of any celebrity, but nevertheless wants to make the public think that Brand X toothpaste can transform them into a “star.” If that person lacked creativity, he might place Vanna White's face or name in a commercial and say, “Look who uses Brand X toothpaste,” but courts would not have a difficult time determining that he had appropriated her commercially exploitable identity. However, this type of blind duplication seems a far cry from Samsung's advertisement, discussed in the following section.
\textsuperscript{76.} Id. at 204-05.
\textsuperscript{77.} 971 F.2d 1395 (9th Cir. 1992), reh'g denied, 989 F.2d 1512 (1993).
\textsuperscript{78.} Id. at 1396.
\textsuperscript{79.} Wheel of Fortune is in syndication and airs daily. According to the White court at the time of the opinion, it is "one of the most popular game shows in television history. An estimated forty million people watch the program daily." Id.
turns the block so as to reveal that part of the word.\textsuperscript{81} White has attained tremendous popularity due to her role on the show, and she markets her identity to various advertisers.\textsuperscript{82}

Samsung Elecs. America, Inc. (Samsung) used a series of advertisements to promote its electronic products.\textsuperscript{83} The advertisements took items from current culture and placed them in the twenty-first century with the Samsung product. All the advertisements had a similar theme: consumers could count on Samsung products to be around for a long time.\textsuperscript{84} The advertisements were intentionally outrageous in their visions of the future in order to be comical.\textsuperscript{85} For example, one advertisement satirized politics by presenting radical talk-show host Morton Downey Jr. in front of an American flag with the caption: “Presidential candidate. 2008 A.D.”\textsuperscript{86} Another advertisement made fun of society’s fitness kick by showing a raw steak with the caption: “Revealed to be health food. 2010 A.D.”\textsuperscript{87}

The advertisement which led to a broadening of the privacy right in California depicted a robot standing next to a game board.\textsuperscript{88} The robot wore a wig, jewelry, and gown that had been chosen to resemble Vanna White’s hair and dress.\textsuperscript{89} The robot’s pose next to the board immediately evoked the image of the game show set of \textit{Wheel of Fortune}.\textsuperscript{90} The caption read: “Longest running game show. 2012 A.D.”\textsuperscript{91} Although all the celebrities were paid in the other Samsung commercials, White had not consented to the advertisement and had not received any compensation for it.\textsuperscript{92}

White sued Samsung in federal district court under: (1) the California common law right of publicity; (2) California Civil Code Section 3344(a); and (3) section 43(a) of the Lan-

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Reference} & \textbf{Number} & \textbf{Page} \\
\hline
\textsuperscript{81} Id. & 971 F.2d 1395, 1396 (9th Cir. 1992), \textit{reh'g denied}, 989 F.2d 1512 (1993) & \textsuperscript{82} White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992), \textit{reh'g denied}, 989 F.2d 1512 (1993) \\
\hline
\textsuperscript{83} Id. & 969 F.2d 1512 (1993) & \textsuperscript{84} Id. \\
\hline
\textsuperscript{85} Id. & 969 F.2d 1512 (1993) & \textsuperscript{86} Id. \\
\hline
\textsuperscript{87} Id. & 969 F.2d 1512 (1993) & \textsuperscript{88} Id. \\
\hline
\textsuperscript{89} Id. & 969 F.2d 1512 (1993) & \textsuperscript{89} Id. \\
\hline
\textsuperscript{90} Id. & 969 F.2d 1512 (1993) & \textsuperscript{91} Id. \\
\hline
\textsuperscript{92} Id. & 969 F.2d 1512 (1993) & \textsuperscript{92} White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992), \textit{reh'g denied}, 989 F.2d 1512 (1993) \\
\hline
\end{tabular}
\end{table}
The district court granted summary judgment against White on each of her claims, and she appealed to the Ninth Circuit.

2. Majority Opinion

On appeal, the circuit court held that the use of the robot was not an appropriation of White's "likeness" within the meaning of California Civil Code section 3344. Consequently, the court therefore affirmed the dismissal of her section 3344 claim. However, the court also held that, in alleging facts showing that her "identity" had been appropriated, White had pleaded a sufficient claim under the common law right of publicity. In reaching this conclusion, the majority in White ultimately relied on three factors: a permissive reading of the common law cause of action identified in Eastwood v. Superior Court, a footnote in Prosser's article on privacy, and a series of circuit court cases expansively interpreting California law.

Whereas the circuit court agreed with the district judge that the robot advertisement had not appropriated White's "name or likeness" under the second prong of Eastwood, the court nonetheless decided that "the common law right of publicity is not so confined." According to the circuit court, the limited facts in Eastwood, which did include such an appropriation, did not allow the California court to determine the extent of the protections afforded under the right of pub-

93. Id. This comment concerns the extension of California law; accordingly, the Lanham Act will not be discussed. See 15 U.S.C. § 1125(a) of the Lanham Act for the precise language.
94. White, 971 F.2d at 1396-97.
95. Id. at 1397 (citing CAL. CIV. CODE § 3344 (West 1993 & Supp. 1994)). For the pertinent text of the statute, see supra text accompanying note 21.
96. White, 971 F.2d at 1397.
98. Id. at 1397.
100. Prosser, supra note 12, at 383.
103. Id.
licity. Therefore, the court concluded that Eastwood did not stand for the position that a right of publicity action may be pleaded only in the terms listed above, but that it "may be pleaded by alleging, inter alia, appropriation of name or likeness."

The court substantiated its conclusions by explaining that the "name or likeness" formulation originated in an article authored by Dean Prosser. According to the court, Prosser articulated this formulation not as an element of a commercial appropriation of a plaintiff's identity, but as a description of the types of cases that, until then, had recognized such an action. Furthermore, the court pointed out that Prosser himself had not excluded the possibility of commercial appropriation without the use of a name or likeness.

Relying upon Prosser's thirty-year-old statement of what might be possible, the court then turned to circuit court cases interpreting California law to determine that the right of publicity is not limited to the appropriation of a name or likeness. In the three federal cases discussed earlier, the courts held that the common law right of publicity cause of action applied despite the fact that none of the defendants had used a plaintiff's name or likeness. Accordingly, the White court stated: "The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable."

Concerned with the value of a marketable identity and the "considerable energy and ingenuity" that create such

104. Id.
105. See supra text accompanying note 25.
106. White, 971 F.2d at 1397.
108. White, 971 F.2d at 1397.
109. Id. See supra text accompanying note 17 for Prosser's statement.
110. White, 971 F.2d at 1398. It is important to note that, even thirty years after Prosser's statement, no California case ever allowed such a broad formulation of the cause of action for the appropriation of the right of publicity. See supra note 91 and accompanying text.
111. The three cases are Midler, Carson, and Motschenbacher. See supra note 101 and discussion supra part II.D.
112. See supra text accompanying notes 27-53.
114. Id. at 1399.
an identity, the court wanted to halt the clever advertising strategies that would get around the name or likeness formulation. The court stated that "it is not important how the defendant has appropriated the plaintiff's identity, but whether he has done so." According to the court, relying on specific means of appropriation such as name or likeness and treating those means as dispositive would eviscerate the right of publicity.

3. Dissenting Opinions

In his dissent from the majority's extension of actionable appropriations to a plaintiff's identity, Judge Alarcon emphasized that all California state court cases involving an appropriation of the right to publicity required proof that a name or likeness had been appropriated. Judge Alarcon criticized the majority's identity analysis for two reasons: (1) the federal cases relied on by the majority were distinguishable in that each appropriation involved an identifying characteristic singular to the plaintiff; and (2) the identity appropriated, if at all, was that of a *Wheel of Fortune* hostess, not Vanna White herself. Judge Alarcon, setting up the potential far-reaching effect of the majority's decision, stated:

The advertisement was intended to depict a robot, playing the role Vanna White currently plays on the *Wheel of Fortune*. I quite agree that anyone seeing the commercial advertisement would be reminded of Vanna White. . . . But the fact that an actor or actress became famous for play-

115. *Id.* at 1398.
116. *Id.*
117. *Id.* at 1399.
118. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1402 (9th Cir. 1992) (Alarcon, J., dissenting), reh'g denied, 989 F.2d 1512 (Cal. 1993). See also, Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) ("The so-called right of publicity means in essence that the reaction of the public to name and likeness . . . endows the name and likeness of the person involved with commercially exploitable opportunities."); Guglielmi v. Spelling-Goldberg Prod., 603 P.2d 454, 457 n.5 (1979) (Bird, C.J., concurring) (skepticism about finding a right in a "personality" because it is "difficult to discern any easily applied definition for this amorphous term"); Eastwood v. Superior Court, 198 Cal. Rptr. 342 (1983) (photograph and name of actor used on cover of magazine); In re Weingand, 41 Cal. Rptr. 778 (1964) (denying an aspiring actor's attempt to change name to "Peter Lorie" when famous actor Peter Lorre objected).
119. White, 971 F.2d at 1403-04.
120. *Id.* at 1404-05.
ing a particular role has, until now, never been sufficient to give the performer a proprietary interest in it.121

Dissenting from the denial of a petition for rehearing,122 Judge Kozinski argued that White's publicity rights would not be "eviscerated" by an advertisement which poked fun at her.123 He maintained that intellectual property rights should have specific limitations, and suggested that the federal copyright laws were better suited to settle such controversies than an ill-defined common law right of publicity.124 In reaching this conclusion, he articulated three principal points: (1) Samsung did not "copy" Vanna White;125 (2) rather, Samsung created something new and funny in its advertisement through parody of a popular cultural icon;126 and (3) the court gave White a personal remedy in this situation which impedes the federal copyright scheme.127

III. Analysis

A. Factual Distinctions: Why White Extended the Common Law Right of Publicity Too Far

1. Misreading of Prior Cases

In protecting a plaintiff's identity, the majority initially sidestepped Eastwood, the case articulating the requirements for stating a cause of action under the California common law right of publicity.128 The California Court of Appeal delineated the manner such an action "may be pleaded,"129 and the Ninth Circuit interpreted the statement with a permissive eye, apparently believing that the test was intended to prescribe one of the ways a plaintiff could proceed.130 Although there is nothing inherently wrong with this reading, the sup-

121. Id. at 1405.
123. Id. at 1514-15.
124. Id. at 1517.
125. Id. at 1515.
126. Id. at 1517.
128. See supra text accompanying note 25.
129. See supra text accompanying note 25.
130. See supra text accompanying notes 102-06.
port for the court’s argument remains questionable at best. To bolster its permissive theory, the court turned to an article on privacy written thirty years ago by Dean Prosser, which, among all its other statements of law, contained an afterthought speculating about what might be possible. Near the end of this same article, Prosser himself indicated that he might not favor such an expansion of actionable appropriations: “It is . . . high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.” In the face of such a cautionary ending, a single footnote seems like a slender reed to lean on in building the court’s legal theory.

The ultimate basis for the majority’s ruling, however, lay in the previous decisions of circuit courts. As the court stated, the three federal cases, Motschenbacher, Midler, and Carson, teach “that the common law right of publicity . . . does not require that appropriations of identity be accomplished through a particular means to be actionable” and further “teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity.” Certainly, the federal cases cited extended actionable appropriations beyond the name or likeness formulation; however, this does not necessarily mean that the right to publicity cannot be specifically limited. As Judge Alarcon pointed out in his dissent, the federal cases themselves suggest one such limitation.

In each of the federal cases, “identifying characteristics unique to the plaintiffs were used in a context in which they were the only information as to the identity of the individual.” For example, in Motschenbacher, the advertisement featured a driver’s race car whose unique and distinctive markings—the only information as to the plaintiff’s iden-

131. Prosser, supra note 12, at 401 n.155.
132. Id. at 423.
134. Id. at 1398.
135. Id. at 1399.
136. Id. at 1402 (Alarcon, J., dissenting).
137. Id. at 1404.
tivy—made it clear that the plaintiff was the person in the car.138

In Midler, the only information provided with respect to the identity of the singer was the voice itself, which was intended to sound just like the plaintiff.139 Claiming that a voice is as distinctive as a face, the court stated that “we are all aware that a friend is at once known by a few words on the phone.”140 For singers who rely on their voices to make themselves identifiable, the human voice is the unique attribute. For example, consider Mariah Carey.141 Although she may have talents that have yet to be discovered by the public, her singing voice alone makes her instantly “recognizable” and separates her in the public’s mind from other entertainers.

In Carson, a manufacturer used the phrase “Here’s Johnny” to promote portable toilets.142 This phrase, well-known as Carson’s unique opening to his show, was again the only information provided as to the identity of the individual.143

Each of these situations, through the use of a single characteristic unique to the plaintiff, made the public think the plaintiff had actually participated in the advertisement or

138. See supra text accompanying notes 27-37. It is also important to note that these facts are consistent with Prosser’s formulation of the right to publicity. Prosser states that an appropriation fails to exist where the defendant publishes a picture of the plaintiff’s automobile with nothing to indicate who owns the car. See supra note 14. In Motschenbacher, however, there were indications as to the owner of the car, so Prosser’s limitation does not apply. Therefore, if Motschenbacher is consistent with Prosser’s description of commercial appropriations, the majority cannot use this case, as it does, to support its extension of the right of publicity along the lines of Prosser’s footnote: “Since Prosser’s early formulation, the case law has borne out his insight that the right of publicity is not limited to the appropriation of name or likeness.” White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992), reh’g denied, 989 F.2d 1512 (1993).

139. See supra text accompanying notes 42-44.

140. See supra text accompanying notes 42-44.

141. Mariah Carey is a pop singer whose vocal abilities brought her considerable fame in the early Nineties. See Tom Moon, Carey Striving for Creative Control; Top Pop Singer is Learning Ropes of Music Making, ATLANTA J. & CONST., Dec. 12, 1993, at N4.

142. See supra text accompanying note 48.

143. The facts in Carson prove somewhat troublesome for the analysis attempted in this section, however, this problem will be addressed more fully in the last section of this comment. For now, think of the phrase describing Carson—which, like the game board in White, is arguably part of the background of the show—as a more direct link to the plaintiff than the game board was to White.
had in some way given a stamp of approval to the product. This statement does not apply to the facts in White. Her personal attributes, such as her face or voice, were not used or represented in any way. The other characteristics of the advertisement “hostess”—the gown, the hair, and the jewelry—are not unique to White or any other woman. After all, White has no monopoly on simply “looking good.”\textsuperscript{144} If the robot, in fact, caused the public to think of a beautiful woman, White certainly might have been one of the women who came to mind. Considering only the robot in the advertisement, however, no one could say that a robot by itself, even a sharp-looking, dressed-up robot in a pretty gown and expensive jewelry, made him or her think solely of Vanna White. Therein lies the fundamental difference between White and the federal cases: the advertisements in the federal cases did not evoke images of a race-car driver or a singer, but identified that particular driver or singer. Yet, as Judge Alarcon stated, “No reasonable juror could find that the robot was a likeness of Vanna White . . . .”\textsuperscript{145}

2. Misapplication of the Legal Standard

Even though the robot in White could not be confused with Vanna, the advertisement did evoke her image. If the robot itself could not evoke her image by simply looking like her, the question remains as to how the advertisement reminded the public of White. The attribute that identified the robot as White, the only thing “unique” or identifiable about the advertisement, was the background of the show on which she performs. This background, although certainly not common to others, serves as an attribute of Wheel of Fortune itself, not Vanna White. The identifying characteristic reveals itself as that of a game show, in which White merely performs

\textsuperscript{144} In fact, she probably does not even have a right in \textit{the particular way} she looks good. A number of cases have repeatedly rejected \textit{style} as a basis for recovery, so White could not successfully claim that certain mannerisms or the way she carries herself give her a personal style that had been infringed upon. Waits v. Frito-Lay, 978 F.2d 1093, 1101 (9th Cir. 1992) (“style imitation alone [is] insufficient for tort liability”). \textit{See also} Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970); Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962).

as the current hostess. White should not have a personal right of recovery for a representation of the show.

Assuming that a robot in a wig and gown could be anybody, but that a robot in a wig and gown on the Wheel of Fortune set is Vanna White, and assuming that she has a right of publicity for such a portrayal, a rule is created which makes the game show an intrinsic part of her commercially exploitable identity. White, and presumably others in the entertainment industry, would therefore have an exclusive right not only in their appearance or their personality, but also in what they do for a living.

It seems improbable that the Ninth Circuit meant to hold that actors and actresses can recover for the roles they play since the majority relies on Prosser. After all, Prosser himself stated that no liability exists for appropriation when the defendant bases a fictional character on the plaintiff’s character, occupation, or the general outline of his or her career. However, this appears to be an underlying principle of the analysis. The majority must have believed that White had made a material contribution to the success of the show, and therefore deserved to recover for a portrayal of her role on the show.

B. Deficiencies in the Arguments Underlying the Right of Publicity

Before suggesting alternatives to the White decision, it is important to acknowledge some of the principles that give

146. As Judge Kozinski points out, this would be a tremendous problem because other than a name, likeness, or voice, celebrities are most often identified with the characters they become famous for playing. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, J., dissenting from denial of petition for rehearing), cert. denied, 113 S. Ct. 2433 (1993). See also Nurmi v. Peterson, 10 U.S.P.Q.2d 1775 (C.D. Cal. 1989). In Nurmi, the 1950's television movie hostess “Vampira” sued the 1980's television movie hostess “Elvira,” alleging that the defendants’ affiliated firms appropriated the plaintiff’s identity by basing “Elvira” on a previously developed character, even though they did not copy that character exactly. Plaintiff cited Midler for the proposition that “the imitation of a distinctive character is actionable under the right of publicity,” but the court distinguished Midler by saying that the plaintiff had only recovered for “the defendants’ fraudulent attempt to deceive the public into believing that the plaintiffs were actually present.” Id. at 1777.

147. See supra note 15 and accompanying text. Even the majority in White would likely admit that a robot in 2012 A.D. must be considered a fictional character.

148. See discussion infra part IV.
rise to the right to publicity. By ascertaining the underlying rationale of the court in extending actionable appropriations to a plaintiff's identity, the errors that would lead to such a broad right can be more easily identified.

Why did the Ninth Circuit feel that Vanna White deserved protection? Presumably, the Ninth Circuit reasoned that in working to achieve fame and to increase marketability, she had a moral interest in her identity that deserved protection. Recall Michael T. MADOW's analysis of this moral argument.149

In applying MADOW's analysis to the case under consideration, the first discussion should explore the question of who "owns" Vanna White. This inquiry is not simply about who is entitled to the economic values that attach to her identity.150 Instead, the critical issue involves Vanna White's meaning to our culture, and whether she has the right to control that meaning through her publicity rights.151

One hears how celebrities have "built" an image or "cultivated" their God-given talents, so we suppose that they deserve all the fruits of their fame.152 As one judge stated: "A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property."153 The majority in WHITE echoed this labor theory, referring to the "considerable energy and ingenuity" that creates a marketable identity.154

However, as MADOW indicates, the public plays a substantial role in creating the meaning that attaches to a particular identity.155 A good example of the public's participation in the "meaning-making" process is the tumultuous career of Michael Jackson.156 Unless performing, Jackson

---

149. See discussion supra part II.E.
150. See discussion supra part II.E.
151. See supra text accompanying notes 58-66.
152. Madow, supra note 54, at 134.
154. See supra text accompanying note 114.
155. See supra text accompanying notes 58-66.
156. Michael Jackson, the so-called "King of Pop" is arguably the most famous singer/entertainer in the world. See Michael Wilbon, We Saw Stars, and They Were Us, WASH. POST, Jan. 27, 1993, at C1.
has always very carefully and deliberately shied away from the press and the public. Nevertheless, his image over the years has gone from eccentric pop superstar, to freakish recluse, to alleged criminal following allegations involving sexual abuse of children.\textsuperscript{157} This phenomenon exemplifies the enormous role played in the meaning-making process by the public and the media. A celebrity’s public image, therefore, is “the product of a complex social process in which the ‘labor’ of the celebrity is but one ingredient, and not always the main one.”\textsuperscript{168} Accordingly, celebrities should not be able to lay a moral claim to the exclusive ownership or control of the economic values that attach to that image.\textsuperscript{159}

Nonetheless, Madow explains that courts and commentators have been unwilling to permit defendant “appropriators” to be unjustly enriched.\textsuperscript{160} As Madow points out, however, celebrities such as Vanna White actually receive a windfall themselves.\textsuperscript{161} For instance, the role White plays on television as a game show hostess was actually created by a number of others, including writers, directors, and producers. Even so, White, and White alone, receives the benefits of the commercial marketability of her identity due to this collaboration.\textsuperscript{162} At the least, it seems unfair that White would complain when another party has not appropriated her identity directly, but has merely drawn from her hostess role through portrayal of the game show itself.

Remembering Madow’s statement that it is not clear how much entertainers “invent” and how much they “convert,”\textsuperscript{163} it is apparent that celebrities like Vanna White seek to have it both ways when they complain about appropriation.\textsuperscript{164} For example, White presumably feels that she has not infringed

\begin{flushleft}
\textsuperscript{157} If the allegations against Jackson prove untrue, it is very convincing evidence that no matter how hard a celebrity tries, he cannot control his public image. See Jessica Crosby, While Jackson Tours, The Lawyers War Suit Against Pop Star Begins to Heat Up, WASH. POST, Nov. 8, 1993, at B1.
\textsuperscript{158} Madow, supra note 54, at 195.
\textsuperscript{159} Id. at 184.
\textsuperscript{160} See supra text accompanying note 67.
\textsuperscript{161} See supra text accompanying note 68.
\textsuperscript{162} Of course, it seems entirely appropriate that she would receive such benefits; this comment does not insist that White can claim no benefits of her fame, but is attempting, first, to point out the theoretical limitations of the arguments favoring the right to publicity, and second, to apply these limitations in order to arrive at a general rule.
\textsuperscript{163} See supra text accompanying note 73.
\textsuperscript{164} Madow, supra note 54, at 198-99.
\end{flushleft}
on another’s right, correctly believing that her own personality and style have added a certain intangible value to the role of a game show hostess. Moreover, she feels that these additions have made her identity on the show qualitatively different than the countless hostesses who have performed on game shows before her. Yet she fails to see the same distinction when Samsung draws from “culture’s image bank.”

In the present case, if Samsung had merely copied Wheel of Fortune and Vanna White, the advertisement would not have been funny. Instead, Samsung, drawing from the image bank, took the underlying idea of the game show—a game board with an elegant-looking hostess who turns the letters—and altered it, thereby creating something new and adding to the bank of existing ideas. As a small piece of this new creation, White received an unfair windfall through the right of publicity.

C. Feasibility of a Laundry List

The notion of one adding to culture’s image bank helps to address the majority’s concern that a “rule which says the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.” Contrary to the majority’s belief that a laundry list is entirely unworkable, such a list actually pushes the clever advertising agent further from an appropriation. For example, in forcing Samsung to circumvent what would be an appropriation—basically, reproducing the “labor” of another, whether it be an idea or an identity—the law forces Samsung to create something instead of copying it. The further Sam-

165. Id. at 199. Madow uses the example of the “openly and unabashedly derivative” Madonna to illustrate this point:

Having drawn freely and shamelessly from our culture’s image bank, she is trying to halt the free circulation of signs and meanings at just the point that suits her. She is seeking to enforce against others a moral norm that her own self-consciously appropriationist practice openly repudiates. The law need not be a party to such contradiction.

Id.

166. The term “laundry list” was used by the majority in White to refer to a list of specific kinds of appropriations. See supra text accompanying note 135.


168. See supra text accompanying note 135.
sung is forced outside the laundry list, the further it gets qualitatively from its original "bank" source.

Dissenting Judge Kozinski supports this view, stating that a laundry list is not only feasible, but necessary in intellectual property law.\[169\] He reveals that other than the specific intellectual property rights conveyed through statutory measures such as California Civil Code section 3344,\[170\] history has allowed people to draw on the work of their predecessors, "referring to it, building on it, poking fun at it; we call this \textit{creativity}, not piracy."\[171\] According to Kozinski, in seeking to do away with specific limitations, the majority has implied that the right of publicity contains "penumbras" that cannot be infringed.\[172\] Under constitutional law, only fundamental rights, those "implicit in the concept of ordered liberty"\[173\] or "fundamental to an American scheme of justice,"\[174\] deserve such lofty status. Considering Madow's discussion,\[175\] it seems unlikely that "ordered liberty" would cease to exist without recognizing the right to publicity as fundamental.

On a more practical level, the failure to confine publicity rights to specific kinds of appropriations will cause future creators—including entertainers and advertisers—to grapple with vague claims of identity infringement. Clearly, under the present state of the law, a robot placed in the wrong context will create liability, but the governing limitations remain unclear. Is the majority willing to extend celebrity ownership of the "meaning-making" process so far that a popular image or identity can never be evoked without consent? If a comical scene in which a robot turns a replica of the \textit{Wheel of Fortune} game board gives White a personal right to recover, then will the show be guilty of evoking her identity even if they replace

\begin{itemize}
\item \[170\] See supra text accompanying note 21.
\item \[171\] White, 989 F.2d at 1515.
\item \[172\] See id. at 1514.
\item \[175\] See discussion supra part II.E.
\end{itemize}
her with an elderly brunette,176 or "a monkey in a wig and gown?"177

In articulating a "protective" rule that is purportedly pro-
artist, the majority has restricted entry into the "image bank"
in a way that stifles creativity and ultimately makes the pub-
lic at large culturally poorer. This "impoverishing of the pub-
lic domain," as Judge Kozinski designates it, will occur since
"[f]uture Vanna Whites might not get the chance to create
their personae, because their employers may fear some celeb-
rity will claim the persona is too similar to her own."178 As
for the public itself, just imagine the enormous social vacuum
that would be created if Bob Barker179 was the host of every
game show, or we had never been introduced to the likes of
Pat Sajak180 or Alex Trebec.181

D. The Copyright Problem

Foreseeing this problem, Judge Kozinski maintained
that the analysis in White should have been based on the fed-
eral copyright laws.182 He stated that Samsung had not cop-
ier White, but had parodied her in her role as hostess on
Wheel of Fortune.183 Wheel of Fortune is a copyrighted televi-

176. This may seem silly because as an employee of the show, the producers
have the right to replace White when her contract expires. However, the court
in White did not clearly define any limits to the right of publicity, and although
the question is asked partly in jest, it does exemplify the uncertainty prevalent
in the entertainment and advertising industries. To answer the question, it
appears that under the current state of affairs the best advice might be: "When
in doubt, pay her off."

177. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1515 (9th Cir. 1993)
(Kozinski, J., dissenting from denial of petition for rehearing), cert. denied, 113

178. Id. at 1516.

179. A popular game show host best known for his work on The Price is
Right. The Price is Right is in syndication and airs daily. See Blonsky, supra
note 80.

180. The host of Wheel of Fortune. Wheel of Fortune is in syndication and
airs daily. Id.

181. Another popular game show veteran known for hosting Jeopardy!. Jeopardy!
is in syndication and airs daily. Id.

182. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1517 (9th Cir. 1993)
(Kozinski, J., dissenting from denial of petition for rehearing), cert. denied, 113

183. The majority quickly dismissed this parody defense, saying that "De-
fendants' 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." White v. Samsung Elecs. Am., 971 F.2d 1395, 1401 (9th Cir. 1992),
reh'g denied, 989 F.2d 1512 (1993).
sion show, and federal copyright law governs parodies of copyrighted works.\textsuperscript{184}

In copyright law, two issues affect the analysis of the present case. First, the world at large has the right to make "fair use" parodies—i.e., takeoffs that do not borrow too much of the original.\textsuperscript{185} Second, the copyright owner has the exclusive right to create or license the creation of derivative works, including parodies that do not qualify for "fair use" rights.\textsuperscript{186} An example of these principles at work would be the recent film \textit{Loaded Weapon I}.\textsuperscript{187} In making a parody of \textit{Lethal Weapon}\textsuperscript{188} and other action movies, the producers of \textit{Loaded} probably acquired a license for a derivative work, since, in all likelihood, they were borrowing more than they had a right to under the "fair use" doctrine.

Maybe Samsung went too far to qualify for "fair use," but whether it should have acquired derivative license is not the issue here. According to Kozinski, the problem is that "the right to make parodies belongs either to the public at large or to the copyright holder, not to someone who happens to appear in the copyrighted work."\textsuperscript{189}

Under the majority's decision to extend the common law right of publicity, however, it appears that celebrities can now block this federal scheme.\textsuperscript{190} Eventually, the two rights are bound to conflict. For example, imagine that a license is given for a derivative work of \textit{Wheel of Fortune} to a poster or T-shirt company. The celebrities of the show, in an effort to control the meaning of their identity, may not want their

\textsuperscript{184.} \textit{White}, 989 F.2d at 1517 (Kozinski, J., dissenting from denial of petition for rehearing).

\textsuperscript{185.} \textit{Id.} (citing Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986)). Remember the discussion of celebrities borrowing from "culture's image bank." \textit{See supra} note 157 and accompanying text.

\textsuperscript{186.} \textit{White}, 989 F.2d at 1517.


\textsuperscript{188.} \textit{LETHAL WEAPON} (Universal 1986). This is one of the above-mentioned action movies. \textit{See} Aljean Harmetz, \textit{Movie Box Offices Break New Records}, N.Y. TIMES, Mar. 25, 1987, at 6B.


\textsuperscript{190.} \textit{White}, 989 F.2d at 1518. Actually, Kozinski stated that the majority's decision "decimates" federal copyright law. \textit{Id}. 
images emblazoned on cheap T-shirts around the country. Essentially, the copyright owner will be robbed of the value of his or her federally-protected copyright, because in order to avoid liability under the common law, he or she will need the approval of the show’s performers. This same type of conflict will arise when someone makes a “fair use” parody, making the parody exception to copyright “useless [since] the parodist is held hostage by every actor whose ‘identity’ he might need to ‘appropriate.’”

Kozinski acknowledges limitations of the copyright laws to subject matters “fixed in any tangible medium of expression.” However, he not only maintains that the laws should have applied under the facts in White, but more importantly, implies that the federal copyright scheme should completely preempt a common law right of publicity. Responding to the majority’s concern about the commercial nature of Samsung’s advertisement, he states the “line between commercial and noncommercial has not merely blurred; it has disappeared.” Because all speech in the entertainment industry is “for profit,” including traditional parodies such as Saturday Night Live or Spy Magazine, Kozinski claims it is too significant to be discarded as not within the federal scheme.

IV. PROPOSAL

This comment disagrees with the decision in White. It also rejects dissenting Judge Kozinki’s implicit argument that there should be no common law right of publicity. Rather, it proposes that limitations must be adopted which

191. Id.
193. White, 989 F.2d at 1518 (Kozinski, J., dissenting from denial of petition for rehearing). Kozinski cites Mosk’s concurrence in Lugosi, wherein Mosk suggests that “the copyright statute . . . be adapted to an artistic or literary creation where there is no actual recorded American copyright.” Lugosi, 603 P.2d at 433 (Mosk, J., concurring).
196. White, 989 F.2d at 1520 (Kozinski, J., dissenting from denial of petition for rehearing).
will define the outer boundaries of the law more clearly and provide a greater amount of certainty for entertainers, advertisers, copyright holders and the public at large.

In the absence of one of the types of appropriation specified under California Civil Code section 3344, this comment proposes the adoption of two limitations on the common law right of publicity. First, the identifying characteristic must belong to the plaintiff.\textsuperscript{197} Second, the public must be under the impression that the plaintiff has personally endorsed the product.

The first proposed limitation—that the characteristic must "belong" to the plaintiff—is not necessarily confined to physical ownership, but it is also not as broad as a simple association. For the purposes of this limitation, "belong" means that the characteristic must be so closely tied to the plaintiff as to identify him or her unmistakably. Thus, Moschenbacher would be allowed recovery because the car, while not physically his characteristic and therefore a "background" trait, did belong to him and was the defining characteristic of his identity.\textsuperscript{198}

The facts of Carson prove more troubling for this test.\textsuperscript{199} It might be argued that the phrase "Here's Johnny" is not a unique characteristic of the plaintiff because it was a part of Carson's television show. The phrase, however, is an identifying characteristic and does directly refer to Carson himself.\textsuperscript{200} In contrast, the identifying characteristic in White had no direct connection to the plaintiff. Although there was some indirect connection, since the plaintiff was an employee of the show and both the plaintiff and the background were ingredients in the show, the identifying characteristic did not represent an attribute of the plaintiff herself.

\textsuperscript{197} By definition, this proposed limitation would include a laundry list of specific actionable appropriations, as in California Civil Code section 3344. See supra text accompanying note 21. This is true because uses such as those of name, likeness, and voice, clearly are unique to, and belong to, a plaintiff. However, the proposed limitation would also move beyond a laundry list, easing some of the concerns of the White majority. See supra text accompanying notes 114-16, 134-35.

\textsuperscript{198} See supra text accompanying notes 27-37, 138.

\textsuperscript{199} See supra text accompanying notes 47-51.

\textsuperscript{200} It might also be argued that, as a use of the plaintiff's name, the distinctive feature belonged to the plaintiff. However, this argument probably stretches the proposed limitation too far. Of course, it is possible that Carson cannot be reconciled with the proposed limitation.
If the identifying characteristic does not belong to the plaintiff, copyright law would be the preferred method of obtaining recovery. This proposal rejects an exclusive reliance on the federal copyright scheme, recognizing that celebrities have commercial interests in their identities that warrant protection. However, these rights should not be so broad and amorphous, such as they are when there is no limitation on the nature of an actionable appropriation, that they infringe on copyright law. Copyright law contains clearly defined boundaries—the right of publicity should have them as well. Through a limitation based on ownership of the identifying characteristic, conflicts between the two theories should not develop as frequently, and hopefully, the rights of copyright holders will not be diminished.

Second, the public must think the plaintiff has given a stamp of approval to the product. This test is obviously subjective, but so is the particular meaning attributed to a celebrity's identity. This proposed limitation would separate appropriations for the defendant's advantage from incidental uses of a plaintiff's identity that might nevertheless benefit the defendant.

For example, as in the case of Motschenbacher, if a close-up of a driver's race car is shown with an advertising slogan under it, a representation of endorsement has been made. However, if the driver's car is merely seen from a distance as one of many driving around a track while a voice says "Drink Brand X Beer," there has not been such an endorsement. Such a commercial could merely mean that people who drink beer like car racing. Unlike White, in each of the federal cases the defendants represented to the public that the plaintiff had supported the product, whether by singing, lending a name, or providing a picture. In White, the public is not under the impression that White endorses Samsung products merely because the advertisement depicts the show which employs her. The public does not mistake the robot for White, despite the efforts to parody her with fancy clothes, wig and jewelry.

The underlying rationale of this proposed limitation relies upon the previous discussion of moral rights. Moral arguments favoring the ability to control one's identity, for
instance, do not support a general right against mockery. This is true because mockery and disagreement, on a certain level, lead to richness and diversity of thought in our culture. However, these moral rights do seem sufficiently strong to restrict representations regarding endorsements of products without consent. Most people would agree that there is an enormous difference between being generally portrayed as a buffoon, and being specifically represented as supporting, endorsing, or approving of a certain product.

Another underlying principle of the proposed approval limitation is the idea of consumer protection. As Madow points out, we cannot assume that consumers buy a certain toothpaste simply because a celebrity with a beautiful smile claims to use that toothpaste. However, such advertisements do provide the consumer with “some information” about the product—even if just the notion that the celebrity has taken the time to endorse the product.

The California Supreme Court is in the best position to implement the foregoing proposed limitations on the common law right of publicity. The Ninth Circuit has signed off on White, meaning that it stands unchallenged as the law. As a matter of state tort law, review of the issue by the United States Supreme Court appears unlikely. California can solve the confusion created by the federal courts in one of two ways: (1) comprehensive state legislation on the issue; or (2) a definitive statement of California state law by the California Supreme Court. Since the former seems improbable as well, entertainers, copyright holders and the public at large must look to the California Supreme Court to define the limits of this state’s common law right of publicity and halt the evisceration of competing rights.

V. Conclusion

In departing from the traditional name or likeness formulation and extending California’s common law right of publicity to anything evoking someone’s identity, the Ninth Circuit in White has created a law which could seriously burden creativity. Considering some of the errors in the underlying rationale of the right of publicity, this stifling effect on creativity is

203. Id.
particularly undesirable. It is important to remember that, unlike the majority's argument in *White*, a narrower definition of the right of publicity will not eviscerate the right. On the contrary, the proposed limitations will provide certainty to all interested parties, thereby stimulating creativity while continuing to protect the interests of entertainers, copyright holders and the public at large.

Todd J. Rahimi

204. See discussion *supra* part III.C.