Restricting the Use of Sound-Alikes in Commercial Speech by Amending the Right of Publicity Statute in California

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Restricting the Use of “Sound-Alikes” in Commercial Speech by Amending the Right of Publicity Statute in California

INTRODUCTION

As the entertainment and advertising media continue to proliferate in our society, the sale of celebrity personas in connection with the promotion of commercial products has become big business. Advertisers use celebrities to promote a variety of products in an increasing array of mediums ranging from television and radio to print and direct mail pieces. Recently, a new breed of advertisements surfaced in the radio and television arena which use an imitation of a

1. The federal courts generally define a “celebrity” as a person whose name is “a ‘household’ word whose ideas and actions the public in fact follows with great interest. . . . In undertaking this examination, a court must look through the eyes of a reasonable person.” Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1292 (D.C. Cir. 1980).

Another federal court has discussed celebrity status, noting that “[s]uch persons [celebrities] have knowingly relinquished their anonymity in return for fame, fortune, or influence. They are frequently so famous that they ‘may be able to transfer their recognition and influence from one field to another.’” Tavoulareas v. Piro and The Washington Post Co., 817 F.2d 762, 772 (D.C. Cir. 1987) (citing Waldbaum, 627 F.2d at 1294 n.15).


According to one talent agent who has lined up such big-name celebrities as Bob Hope, Roger Moore, and Carol Channing for commercials, “[n]obody is unreachable because money talks.” Commercials: Few Unreachable for Testimonials, TV/Radio Age, Jan. 20, 1986, at 49.
distinctive celebrity voice in order to attract attention to a product. These advertisements are termed "sound-alike" commercials since they involve a third person who attempts to sound like a particular celebrity.³

When product promoters realize that infusing a celebrity's identity into their product will inevitably be a profitable venture, they are increasingly willing to pay large sums of money for the privilege of using a celebrity's identity; substantial benefits may be involved.⁴ However, in some instances a promoter is unwilling to pay the high price that a particular celebrity demands or the promoter finds that he or she is simply unable to persuade the celebrity to endorse a product. Such a situation sets the perimeters for this Comment since a celebrity's decision to avoid engaging in certain promotional activities frequently leads to the violation of a celebrity's right to control his or her persona, especially in the context of "sound-alike" advertisements. A further illustration of this problem is provided in the following hypothetical fact situation.⁵

An advertising agency decides to use a popular song in a television commercial to attract a "Yuppie" target audience by invoking college memories. However, as is often the case, the celebrity who originally made the song famous refuses to perform in the commercial. The alternative available to the agency is to hire another singer who is instructed to imitate the celebrity's original recording. In an effort to legally protect itself, the agency adds a disclaimer at the end of the commercial that states: "celebrity voice impersonated."

Immediately after the commercial hits the television airwaves, the celebrity's colleagues inform her that the voice in the commercial sounded exactly like her voice. More importantly, her agent informs her that the public has reacted in much the same way by misconstruing the voice in the commercial for her voice. Her first reaction is anger over the fact that the agency achieved the same benefit from their "sound-alike" commercial as they would have received if she had performed the song herself. The celebrity believes that by doing so, they wrongfully avoided paying the high price she would have demanded if she had agreed to perform in the commercial.

4. Promoters realize they must initially project some attractive image to their target audience simply to gain their attention. This was an advertising truism as far back as 1758, as evidenced by Samuel Johnson's statement: "Advertisements are now so numerous that they are very negligently perused, and it has therefore become necessary to gain attention by magnificence of promises and by eloquence sometimes sublime and sometimes pathetick." S. JOHNSON, THE IDLER (1758), reprinted in THE GREAT QUOTATIONS 5 (G. Seldes ed. 1977).
5. The author draws this hypothetical almost exclusively from the fact pattern of Midler v. Ford Motor, Co., 849 F.2d 460 (9th Cir. 1988), which is discussed in further detail within this Comment. See infra notes 77-81, 83, 85, 88, 89 and accompanying text.
In addition to feeling that the agency was unjustly enriched by using the "sound-alike" singer, the celebrity contends that she suffered a significant blow to her professional reputation as a result of the commercial. As evidenced by the confusion experienced by her colleagues and the general public, she justifiably fears that consumers will mistakenly believe she endorsed that particular product. In actuality, she may be well known and publicly admired for deliberately avoiding any association of her persona with commercial products for personal as well as moral reasons.

Although the disclaimer "celebrity voice impersonated" cleverly serves to avoid a possible misrepresentation claim, the commercial nevertheless directly focuses the public's attention on the celebrity image through use of the "sound-alike." This overt act by the advertiser does not necessarily dispel the connection between the celebrity and the advertised product, since as one scholar noted, "the very act of disclaiming becomes the act of appropriation." By drawing attention to the celebrity voice incorporated within the commercial, the advertiser has ultimately enhanced the product's appeal regardless of the use of the trailing disclaimer. Therefore, the celebrity maintains that the blanket disclaimer does not vindicate her rights nor does it provide a remedy for the economic and intangible reputational harm she suffered as a result of the "sound-alike" commercial.

With the tremendous growth of the twentieth century media, the question is raised as to the available remedies for celebrities in such a predicament. The responsibility for that answer has been left to the legal system. Generally, the remedy available to a person seeking recovery for the commercial use of his or her name or likeness, without consent, is a cause of action for invasion of privacy stated under common law principles or state statute. However, if a potential plaintiff is a public figure (a "celebrity"), as a general rule, in every jurisdiction, he or she is deemed to have waived his or her right of privacy in the eyes of the law.6

7. One scholar noted that "the tremendous strides in media" in the latter part of this century demand increasing the protection of images. Nimmer, The Right of Publicity, 19 L. & CONTEMP. PROBS. 203, 204 (1954).
8. For the purposes of this Comment, a public figure will be termed a "celebrity." For a definition of a celebrity, see supra note 1.
Celebrities need not dismay, however, because during the past thirty years the legal system has responded by developing the doctrine of the right of publicity. The doctrine consists of "the legally protected interest that public figures have in the publicity value of their names, images and likenesses." It entitles the owner of the right to the exclusive benefit of the economic gain from the right.\(^{11}\)

The courts have developed and many state legislatures have broadened the doctrine to protect a celebrity's interest in maintaining exclusive control over "the exploitation of his or her identity's associative value," the value to advertisers of associating their product with the celebrity.\(^ {12}\) In sum, the doctrine is based on the celebrity's right to be free from the appropriation of his or her name or likeness by another for the other's financial benefit, since in most cases the celebrity has expended tremendous resources in the development of his or her image.

The right of publicity for celebrities can be invoked in a number of ways, including: the use of a celebrity's name or likeness to imply endorsement of a product;\(^ {13}\) the use for promotional purposes in order to enhance product identification by the consumer;\(^ {14}\) and the use for the primary purposes of increasing a publication's circulation.\(^ {15}\)

Additionally, courts have recently applied the doctrine to an increasing range of personal attributes.\(^ {16}\) These include "proprietary interests in a 'celebrity's name, likeness, nickname, voice, professional act, character portrayal, slogan, and possessions associated with him.'"\(^ {17}\) This Comment contends that the invocation of the right of publicity should similarly be allowed when an imitation of a celebrity's voice is used in commercial speech, such as in the preceding "sound-alike" hypothetical.

Since the right of publicity is a relatively new doctrine in the legal arena, only a minimal amount of authority exists espousing this Comment's premise. William Prosser, in his treatise on tort law, set forth the contention that the right of privacy, which includes the


\(^{11}\) Halpern, supra note 6, at 1248.

\(^{12}\) Id.

\(^{13}\) Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).


\(^{15}\) Cher v. Forum Int'l, Ltd., 692 F.2d 634, 639 (9th Cir.), cert. denied, 462 U.S. 1120 (1982).


\(^{17}\) Id. (footnote omitted) (citing Note, The Right of Publicity, Section 43(a) of the Lanham Act and Copyright Preemption: Preventing the Unauthorized Commercial Exploitation of Uncopyrighted Works of Art, 2 Cardozo Arts & Ent. L.J. 265, 278-79 (1983).
right of publicity under his analysis, can be invaded "by appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or likeness." Hence, Prosser foreshadowed the necessity of providing a remedy to a celebrity in a "sound-alike" situation.

Additional authority upon which this Comment bases its suggestion is found within *Midler v. Ford Motor Co.*, a recent United States Court of Appeals case which held that the imitation of a professional singer's distinctive voice in commercial advertising is an illegal appropriation of the singer's identity. In *Midler*, the court stated that the singer, Bette Midler, could have gained recovery under California's right of publicity statute if the statute had only included protection for "vocal imitation" in its text. The applicable California statute states in pertinent part:

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

This Comment suggests that the California legislature amend the right of publicity statute to encompass vocal imitations. A statutory amendment will be proposed within this Comment which would allow a celebrity to recover for such "sound-alike" advertisements as described in the preceding hypothetical. Just as California has found itself at the forefront of developing legal doctrines in the past, by following this Comment's recommendation, the legislature would be taking the initiative to extend the doctrine of the right of publicity to include vocal imitation. Since California law, in conjunction with New York, delineates the perimeters and development of the right of publicity, a California statutory amendment in this area may ultimately be dispositive nationwide.

As this Comment will establish, the proposed amendment would necessarily fill an existing void in the legal arena by eliminating the

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20. Id.
22. Similarly, Felix Kent, a renowned authority on advertising law, notes: "Since many, if not most, celebrities of the entertainment world reside in California, decisions in the Ninth Circuit are of great weight for the advertising industry." Kent, *A New Tune in Using 'Sound-Alikes'*, N.Y.L.J., July 22, 1988, at 3, col. 1. Kent's observation would likewise hold true for decisions made by the California legislature.
unfairness of the current law, which affords “sound-alike” advertisers undeserved windfalls. The amendment would also provide certainty for celebrities in this murky area of the law which has a unique basis in California culture.

To achieve this purpose, in Part I, this Comment will provide an analysis of the evolution and development of the right of publicity. Part II will then focus on the existing limitations on the right of publicity that are necessary to protect the first amendment rights of freedom of speech and expression for the media as a whole and for impersonators and entertainers who imitate celebrities for the purposes of their performances. Drawing from these legal bases and policy justifications, Part III will argue that vocal imitations should be granted protection within a California codification of the right of publicity. Finally, Part IV will present a suggestion to the California legislature to amend Civil Code section 3344(a) to afford celebrities a cause of action against “sound-alike” advertisers by adding the words “vocal imitation” to the statute.

I. EVOLUTION AND DEVELOPMENT OF THE RIGHT OF PUBLICITY

The right of publicity originated from a variety of legal areas, ranging from copyright and property law to various rights of privacy. Its development has been shaped by the rationales offered by the courts and scholars in the context of each of these areas of law. Theories developing from those areas are set out in a “trilogy” of seminal law review articles.

A. Privacy Right Analysis

There is a consensus among scholars that the right of publicity originated from the right of privacy as articulated by Samuel Warren and Louis Brandeis in a renowned law review article. The article describes privacy as the “right ‘to be let alone.’” The rationale offered on behalf of the right focused on the traditional tort concepts that the invasion caused personal injury to a person’s dignity and state of mind, as well as causing mental distress.

However, many problems quickly become apparent when one attempts to analogize the right of publicity to the right of privacy. The rationales behind the privacy interpretation do not transfer to the

24. Id. The “trilogy” of law review articles is: Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890); Nimmer, supra note 7; and Prosser, Privacy, 48 CALIF. L. REV. 383 (1960) [hereinafter Prosser, Privacy].
26. Id. at 195 (citing T. COOLEY, COOLEY ON TORTS 29 (2d ed. 1886)).
27. Id. at 197.
publicity right. For instance, no privacy argument alleging indignity or mental distress on the part of a celebrity can be validly asserted since the celebrity’s image has already been spread throughout the media with the celebrity’s consent. As one scholar noted:

[P]rivacy is the one thing they [celebrities] do “not want, or need.” Their concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy. However, . . . [the celebrity does not wish] to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him.28

Thus, the right of privacy remedies tend to remain inadequate since a celebrity’s true complaint is that he or she suffered “uncompensated,” rather than unwelcome, publicity.”29 Consequently, this area of the law was ripe for a new theory which could provide a rationale more closely related to the right of publicity.

B. Property Right Analysis

Fortunately, a federal court, in the 1953 decision of Haelan Laboratories v. Topps Chewing Gum, provided a new theory, and the analysis within a second law review article published in 1954 expanded on this theory in its response to the implications of the Haelan case.30 The phrase “right of publicity” was first coined in Haelan when the court upheld the rights of a baseball player who assigned his right of publicity to a company manufacturing chewing gum cards.31 The importance of this decision is clear; it laid the basis for the theory that the right of publicity is ultimately based on a property right.

The rationale underlying the decision was that a person who has invested years of practice, effort, or competition in developing a public personality should have the exclusive right to realize the monetary profits from his or her marketable status. In line with the preceding arguments, the court held the right of publicity was an independent and distinct right from the right of privacy.32 Thus, the court recognized a property right in a person’s identity.

Additionally, the court found New York law provided an indepen-

30. Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953); Nimmer, supra note 7.
31. Halpern, supra note 6, at 1201; Haelan, 202 F.2d at 868.
32. Haelan, 202 F.2d at 868.
dent common law right protecting economic interests in a celebrity's personality. The right was later extended to include not only a person's name and likeness but also that person's reputation and accomplishments.

A year after the *Haelan* decision, Melville Nimmer wrote a law review article which has been described as "the cornerstone of the right of publicity." After Nimmer set out to expose the deficiencies inherent in a privacy law analysis of the right of publicity, he suggested that "[t]he right of publicity must be recognized as a property right."

The rationale behind Nimmer's property theory is apparent in the following statement:

> [E]very person is entitled to the fruit of his labors unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories... persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity—that is, the right of each person to control and profit from the publicity values which he has created or purchased.

One scholar refines Nimmer's property analysis as follows: "The interest, a function of the societal recognition that commercial value may be associated with the persona of celebrity, should serve as the primary tool for shaping the form and content of the right."

By asserting that the right is a property right, the opinion in *Haelan*, coupled with the effectiveness of Nimmer's property policy arguments, paved the way for a recognition of an independent common law right of publicity in federal and state forums.

Finally, William Prosser strengthened the property analysis in his discussion of the four separate invasions of the right of privacy:

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

It is under the latter category of misappropriation that the right of publicity has developed, according to Prosser and many other legal

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33. *Id.* It is essential to note the federal court's interpretation of New York law in the *Haelan* decision is generally accepted by all jurisdictions since New York is at the forefront of the doctrine's development. See Halpern, *supra* note 6, at 1202.


37. *Id.*


The misappropriation of a plaintiff's personality involves a critical distinction from the other three invasions of privacy in that misappropriation can involve not only the right to be let alone but also "the right to be paid for being 'bothered.'" This is often the case when a celebrity's personality is misappropriated. Hence, a misappropriation analysis can be helpful in conjunction with a property analysis since it is based upon the same rationale of protecting a celebrity's commercial value in his or her persona.

C. Copyright Law Analysis

Many scholars analogize the right of publicity to copyright law since one of the major policies underlying copyright law, that copyrights provide incentives for enterprise and creativity, also applies to the right of publicity. Just as the issuance of copyrights furnishes an incentive to create by ensuring artists the ability to reap the benefits of their work, the right of publicity provides "an incentive for individuals whose 'works of art' consist of their own images. . . ." However, the use of copyright theory as a basis for the development of the right of publicity has met with a substantial amount of opposition.

In his previously mentioned law review article, Nimmer distinguished the right of publicity from the infringement of copyright law. Nimmer stated that while copyright infringement requires proof of the likelihood of confusion regarding a source, or proof of confused association, some unpermitted advertising uses of a celebrity's identity do not involve false endorsement. For example, many times promoters use the images of celebrities in their advertisements without representing in any way to the consumer that the personality endorsed the product.

Based on this foundation, Nimmer set out the test for determining infringement in right of publicity cases as centering around the fact that attention has been drawn to a product or its advertisement by

40. Id. at 415.
42. Comment, supra note 10, at 1707.
43. Id.
44. Nimmer, supra note 7, at 212.
45. Id. at 213.
46. McCarthy, supra note 23, at 1709.
an identifiable use of the celebrity's identity. Such a test differs distinctly in its application and outcomes from the "likely confusion" test used in trademark and unfair competition law.

D. The Right of Publicity as a Property and Appropriational Right

In summary, the policies underlying the right of privacy and copyright law fail to adequately present solid rationales for the evolution of the right of publicity, since both areas of law ultimately protect interests distinct from those the right of publicity seeks to protect. Consequently, an analysis of the right of publicity is best undertaken by using the property law rationale, combined with appropriation rights, since the value of association of the celebrity's persona is the major consideration for celebrities seeking remedies under the right of publicity.

The next section addresses the possible conflict between a celebrity's property right to his or her image and the first amendment right of free speech.

II. Immunization of Entertainment and Newsworthy Subjects as Beyond the Reach of Right of Publicity Claims

First amendment considerations are important to a discussion of the right of publicity because a question exists as to where to draw the line between the right of the public to know and disseminate information about celebrities and an act of misappropriation against such a celebrity. Considerations favoring dissemination boast strong allies such as former Supreme Court Justice Hugo L. Black who stated, "The constitutional guarantee of a free press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

Alternatively, celebrities may maintain that they should have exclusive control over their images and the reportage of their private lives since the media has such a pervasive effect in twentieth century society. In many instances, celebrities may believe that the press should be disallowed from invoking their image at all, even in the context of reporting topical events. Celebrities possess a valid argument, for, as even the Commission on Freedom of the Press was

47. Nimmer, supra note 7, at 212.
50. In 1942, an impartial commission of well-respected professors from America's most renowned universities was formed at the request of Henry R. Luce, founder of Time, Inc., to study mass communication, evaluate the performance of the media, and to
forced to concede, “[t]hese instruments [press, radio and other means of modern mass communication] can spread lies faster and farther than our forefathers dreamed when they enshrined the freedom of the press in the First Amendment to our Constitution.”

Additionally, celebrities may argue that just as freedom of the press exists for the public and the media’s benefits, freedom from the press’s use of a celebrity’s persona is similarly an important consideration. In essence, the following statement exemplifies their argument: “While they shriek for ‘freedom of the press’ when there is no slightest threat of that freedom, they deny to citizens that freedom from which the decencies of life entitle them. They misrepresent, they distort, they color, they blackguard, they lie.”

Hence, advocates of either side (free press versus restricted press) have strong policy and constitutional considerations in their favor.

However, it must be conceded that certain aspects of the right of publicity doctrine are in direct conflict with the first amendment. Therefore, a court must “reconcile an individual’s private right to profit from his personality with the need to the public to be informed about that personality.”

One scholar noted that when considering issues of freedom of the press, “the crux is not the publisher’s ‘freedom to print’; it is rather, the citizen’s ‘right to know.’” In sum, these are the relevant competing considerations that courts are forced to take into account when dealing with right of publicity claims.

As the right of publicity doctrine expanded in the state and federal courts, the media feared a possible chilling effect upon their ability to report and cover entertainment and topical issues. One scholar recognized the trend as signaling a “dramatic reduction in press freedom.”

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51. Id. at 3.
53. Felcher & Rubin, The Descendibility of the Right of Publicity: Is There Commercial Life After Death?, 89 Yale L.J. 1125, 1129 (1980). “[W]hen an individual exercises control through a right of publicity, there often is a significant conflict between that action and the First Amendment interest in the general use of information.” Id.
56. Ashdown, Media Reporting and Privacy Claims – Decline in Constitutional
It appeared that this fear was well-founded after the 1977 United States Supreme Court's decision in *Zacchini v. Scripps-Howard.* In *Zacchini,* a television station broadcast a performer's entire live act against his wishes. The Court allowed the performer to recover against the station based on an infringement of his right of publicity. The Court held that a state may decide that an individual's right of publicity sometimes outweighs the freedom of the press. If the individual can prove injury based on the broadcast or publication, damages should be awarded. The media feared the potential implications of such a decision which, in principle, negated their usual defense of newsworthiness.

Regardless of the apparent harsh effect of *Zacchini,* the media has been afforded a great deal of protection from the erosion of the free speech doctrine since the right of publicity is not generally applied to magazine or newspaper articles, history, books, plays, biographies, and other factual subjects of public interests. These media forms are beyond the reach of the right of publicity. Since these forms are protected, it cannot be validly asserted that the right of publicity completely outweighs the media's freedom of expression.

Several cases since *Zacchini* have upheld media first amendment claims over a celebrity's right of publicity where literary works were involved or where the medium's purpose was not commercial. For instance, in *Hicks v. Casablanca Records,* the court used "a balancing test between society's interest in the speech for which protection is sought and the societal . . . interests . . . seeking to restrain such speech" and subsequently disallowed the right of publicity claim. The court held that books and movies should be considered "vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections." Similarly, courts have held that the right of publicity does not apply when a celebrity's name or picture is used in connection with the dissemination of news or matters of public interest, since both of these are vehicles

58. *Id.* at 578.
59. Halpern, *supra* note 6, at 1252.
60. Although an obvious difficulty becomes apparent when one tries to draw a clear line between what type of speech can be classified as newsworthy as opposed to being purely commercial, the California courts have developed a three-part test that is helpful in distinguishing the two competing types of speech. The "three-part test for newsworthiness" includes analysis of the following factors: "(a) The social value of the facts published; (b) the depth of the intrusion into ostensibly private affairs; and (c) the extent to which an individual voluntarily acceded to a position of public notoriety." *Wasser v. San Diego Union,* 191 Cal. App. 3d 1455, 1461, 236 Cal. Rptr. 772, 776 (1987).
61. Halpern, *supra* note 6, at 1252.
63. *Id.* at 430.
through which ideas and opinions are disseminated.  

Similarly, *Eastwood v. Superior Court*, a California appellate court decision, establishes this premise in an extensive opinion. In *Eastwood*, Clint Eastwood brought a cause of action against the National Enquirer magazine for infringement of his right of publicity. He based his complaint on a story printed by the National Enquirer which related his purported romantic involvement in a love triangle. Eastwood’s claim was held insufficient to make the magazine’s conduct actionable under the common law or California’s right of publicity statute.

The court established that “[p]ublication of matters in the public interest...to tell it, cannot ordinarily be actionable.” The court then continued by providing a definition of matters in the public interest: “The privilege of printing an account of happenings and of enlightening the public as to matters of interest is not restricted to current events; magazines and books, radio and television may legitimately inform and entertain the public with the reproduction of past events, travelogues and biographies.”

The court set out that Eastwood, by creating a legitimate amount of public attention through his accomplishments as an actor, had a public interest attached to himself. Hence, “a celebrity has relinquished ‘a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs or character.’”

The court precluded liability against the National Enquirer because it found the public concern with Eastwood’s life precluded its imposition. The court refused to extend the right of publicity to this type of celebrity claim and stated “[a]bsolute protection of the press in the case at bench requires a total sacrifice of the competing interest of Eastwood in controlling the commercial exploitation of his personality.” The court concluded by holding that “[t]he scope of the privilege extends to almost all reporting of recent events even though it involves the publication of a purely private person’s name or likeness.”

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66. Id. at 421, 198 Cal. Rptr. at 349.
68. Id. (citing Carlisle, 201 Cal. App. 2d at 746, 20 Cal. Rptr. at 414).
69. Id. at 422, 198 Cal. Rptr. at 350.
70. Id. (citing Carlisle, 201 Cal. App. 2d at 747, 20 Cal. Rptr. at 414).
71. Id.
72. Id.
As evidenced by the above-cited discussions of case law, it seems, in the context of right of publicity cases, courts continue to recognize that the freedom of the press is constitutionally guaranteed in most instances and that the publication of daily news is a necessary public function. Consequently, the doctrine of the right of publicity does not prevent the media from continuing to rake celebrity muck. This allowance is based in part upon the following policy consideration:

When there is muck to be raked, it must be raked, and the public must know of it, that it may mete out justice. . . . Publicity is a great purifier because it sets in action the forces of public opinion, and in this country public opinion controls the courses of the nation.73

Just as courts protect celebrity “muckraking,” they are likewise careful to balance all competing interests to protect celebrity parody and impersonation acts.74 Since entertainment remains unaffected by the right of publicity, a comic would not have to pay to do an impression of a celebrity. The comic is not appropriating the celebrity’s persona in order to sell a commercial product, an instance where reimbursement to the celebrity would be in order. Instead, the comic is engaged in a form of entertainment which invokes imitation of the celebrity voice. However, that particular form of entertainment focuses on the comic’s talents which enable him or her to engage in effective impersonation. Obviously, an argument exists that the comic is in essence selling the celebrity’s persona for his own commercial benefit. However, the entertainment value to the public of such abilities would be held to outweigh the imposition of the doctrine of the right of publicity to acts of comic impersonation.

Although the above discussion appears to preclude the right of publicity from ever outweighing freedom of expression,75 right of publicity cases do involve a delicate balance between the media’s right to inform the public about newsworthy people and the celebrity’s right to enjoy the monetary and reputational benefits of hard work. For that reason, the law has attempted to create such a balance, yet the scales are not weighted evenly. In reality, the right of publicity probably does place some measure of a chilling effect on creators in the entertainment and media fields. However, it appears evident that while celebrities can protect the value of their commercial exploitation, they cannot exempt themselves from social commentary, as was demonstrated in Eastwood.

Commercial speech has been accorded less first amendment protection than other forms of speech as it has been regulated more vigorously by the courts and the Federal Communications Commis-

73. Charles Evans Hughes, Address to the Manufacturer’s Association (May 1908), reprinted in The Great Quotations 676 (G. Seldes ed. 1977).
74. Halpern, supra note 6, at 1253.
75. Id. at 1252.
tion. The United States Supreme Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values. . . ."\textsuperscript{76} As a result, courts already have the propensity to balance interests within the commercial speech area and have established precedents to deal effectively with any chilling effects upon the media in that area. It is important to note at this juncture that the scope of sound-alikes relates only to commercial speech, as opposed to speech that justifiably requires stronger protection because of its newsworthy value. Therefore, the suggestion that celebrities be allowed recovery for vocal imitations would not stretch beyond the perimeters of commercial speech, thus exempting entertainment and newsworthy subjects as discussed above.

In Part III, an analysis of the \textit{Midler v. Ford Motor Co.} decision is undertaken. That decision provides support for allowing the right of publicity to protect celebrities against "sound-alike" advertisements in purely commercial speech.

III. THE MIDLER V. FORD MOTOR CO. DECISION: A Foothold for Stronger Legislative Action

In \textit{Midler v. Ford Motor Co.}, an advertising agency deliberately hired an imitator to impersonate Bette Midler's singing voice for a television commercial. In a unanimous decision, the Ninth Circuit Court of Appeals found that Midler's voice was of such great value to the advertising agency that the agency should be required to reimburse Midler for the market value of the performance as if it was actually performed by her.\textsuperscript{77} The court decided that a celebrity should be allowed recovery under the right of publicity for the commercial imitation of his or her voice since "[a] voice is as distinctive and personal as a face."\textsuperscript{78}

The judges agreed that the imitation violated a common law property right which Midler possessed in her own voice. It was obvious to the court that the advertising agency "used an imitation to convey the impression that Midler was singing for them."\textsuperscript{79} Hence, by seeking to use an attribute of Midler's identity without compensation, the court inferred that the advertising agency was unjustly enriched through the benefits Midler's property right bestowed upon their

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\begin{itemize}
\item[76.] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
\item[77.] Midler v. Ford Motor Co., 849 F.2d 460, 460 (9th Cir. 1988).
\item[78.] \textit{Id.} at 463.
\item[79.] \textit{Id.}
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product. The conclusion was reached that "[t]o impersonate her voice is to pirate her identity." 80

Based upon this conclusion, the court held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California." 81

Relying upon the Midler court's adherence to the property theory, this Comment contends that the right of publicity statute in California should be amended to include vocal imitations. 82 In addition to the rationales previously established in favor of the property analysis of the right of publicity, additional policy reasons exist for extending the statute to include vocal imitations. These policy reasons are discussed in the next section.

IV. POLICY REASONS FOR INCLUDING "VOCAL IMITATIONS" UNDER THE RIGHT OF PUBLICITY

The preceding discussion established that a substantive right of publicity is available for celebrities based upon the property right interest they possess in their personas. Consequently, this Comment's suggested expansion of California's statutory right of publicity to include vocal imitations is based on analogies to the previously discussed rationales for the right of publicity itself. Additionally, several strong policy reasons exist which back up the contention that vocal imitations of a celebrity's voice should be actionable under the right of publicity doctrine. They include: (1) the apparent absence of any legal remedy on behalf of celebrities; (2) the inherent value of the distinctive voice; (3) encouragement of achievement in a chosen field; (4) preservation of a celebrity's image; and (5) prevention of unjust enrichment by "sound-alike" advertisers.

A. Current Absence of Remedy

At present, no remedy exists for a celebrity to obtain the fair market value of his or her voice when it is intentionally imitated in commercial advertising. It is clear that no remedy can be found in copy-

80. *Id.*
81. *Id.*
82. Additional authority for this Comment's suggestion is a similar New York case in which a celebrity, who invested 40 years in the development of his public personality as "Mr. New Year's Eve," recovered under New York law against an advertising agency who used his voice in an advertisement, as was done in the *Midler* case. Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977). The court held the celebrity's identity was embedded in his distinctive musical style, therefore, he was entitled to protection based on the fact that he had painstakingly built a public persona that had marketable status. The court stated: "[T]he imitation is completely unfair, amounts to a deception of the public, and thus exploits the respondent's property right in his public personality." *Id.* at 624, 396 N.Y.S.2d at 665.
right or trademark law since a style of voice is not copyrightable. As the court in Midler pointed out, there are too many existent variables in voice tone and texture to allow it to be copyrighted.83

By the same token, the right of publicity protects an interest which copyright law does not protect, since a celebrity’s persona or identity need not be tangibly fixed in a medium of expression to merit recovery under the right of publicity.84 However, it is imperative that the voice be protected, just as a celebrity’s photograph is protected, because it contains identifiable qualities. For instance, the Midler court stated: “The human voice is one of the most palpable ways identity is manifested. . . . At a philosophical level it has been observed that with the sound of a voice, ‘the other stands before me.’”85

Absent a remedy for a celebrity in a vocal imitation situation, the policy rationales for the doctrine itself, which include benefiting from one’s own property right, are abandoned. In order for courts to uphold these rationales for future applications of the doctrine, they should utilize the doctrine in all situations where a celebrity’s right of publicity is violated. Accordingly, the absence of any other remedy for a celebrity supports the contention that the right of publicity should include vocal imitations.

B. Inherent Value of the Distinctive Voice

Secondly, the distinctive voice of a well-known celebrity is valuable to an advertiser, requiring compensation for the use of that value. “A celebrity’s persona [which inherently includes the distinctive voice] confers an associative value, or economic impact, upon the marketability of a product.”86 It necessarily follows that an advertiser should pay for that value.

In her dissenting opinion to the Lugosi v. Universal Pictures decision, former California Supreme Court Chief Justice Rose Bird set out the rationale for granting a celebrity recovery for the use of their associative value as follows:

Such commercial use of an individual’s identity is intended to increase the value or sales of the product by fusing the celebrity’s identity with the product and thereby siphoning some of the publicity value or good will in the celebrity’s persona into the product. This use is premised, in part, on public

83. Midler, 849 F.2d at 462.
85. Midler, 849 F.2d at 463 (citing D. IHDE, LISTENING AND VOICE 77 (1976)).
86. Halpern, supra note 6, at 1242 (emphasis added).
recognition and association with that person's name or likeness, or an ability to create such recognition. 87

In *Midler*, the court recognized that Midler's voice was obviously of some value to the advertising agency since it could not otherwise explain why the agency would instruct the "sound-alike" singer to imitate Midler. 88 Hence, it is in the interest of fairness that a celebrity receive the value of what the market would have paid for him or her to perform in the advertisement in person. 89

C. Encouraging Achievement

A third rationale behind allowing recovery for the deliberate commercial imitation of a celebrity voice is that recovery allows for "vindication of the right" of publicity, which, in turn, encourages achievement in the celebrity's chosen field as well as encouraging talented individuals to enter publicity-generating professions. 90 This is premised upon the valid assumption that when a performer has a low expectation of a return from the exploitation of his or her publicity value, the financial incentive to create is diminished. 91 In today's highly-marketed society, a significant portion of a celebrity's financial support could come from commercial exploitation.

In *Zacchini*, the court established that the right of publicity "provides an economic incentive to make the investment required to produce a performance of interest to the public." 92 In essence, it fosters creativity by protecting individuals who have used their talents to gain societal recognition. An amendment to the right of publicity statute would perhaps provide economic incentives for celebrities to engage in the activities which would build recognition value through voice. "[T]he law should seek to increase the potential benefits to society by expanding, rather than contracting, the category of people who can take advantage of a survivable right of publicity." 93 Allowing recovery for the vocal imitation of a celebrity's voice would indeed benefit society, as performers would be encouraged to produce artistic endeavors which ultimately benefit the public.

In sum, providing legal protection for the economic value of one's identity against unauthorized commercial exploitation creates a powerful incentive to expend the time and resources necessary to develop

89. *Id*.
92. *Id*.
the skills required to gain public recognition. It thereby ensures that
individuals reap the rewards of their endeavors.

D. Preservation of the Celebrity's Image

A fourth argument for allowing recovery is that it would aid in
preserving a celebrity's public image by discouraging unauthorized
appropriations of a celebrity's identity. Otherwise, a celebrity may
be degraded by the suggestion that they would lend their identity to
a particular product. For example, Cher, a motion picture star,
claimed that her image as a major celebrity was degraded by the
suggestion that she would grant an exclusive interview to a certain
publication.\footnote{Cher v. Forum Int'l, Ltd., 692 F.2d 634, 637 (9th Cir.),\textit{ cert. denied}, 462 U.S. 1120 (1982).} She believed that her efforts to control the projection
of her public image were undeniably disrupted by that suggestion.
Such an unauthorized use in a publication could substantially alter
the celebrity image.

Additionally, consumers are often misled regarding a celebrity's
willingness to associate themselves with the product. Some celebri-
ploit the value of his or her image is a decision that shapes the scope
of their persona and public image. The choice ultimately affects how
they are viewed by the public.

Because celebrities normally make such decisions based on per-
sonal and moral grounds, their choice should be respected and pro-
tected.\footnote{Some relevant considerations for celebrities who choose not to advertise may be
based on those provided within George Keenan's statement: "The immense impact of
commercial advertising...tends to encourage passivity, to encourage acquiescence and
uniformity, to place handicaps on individual contemplativeness and creativeness." Kee-
nan, Address to Notre Dame University (May 15, 1953), reprint in \textit{The Great Quo-
tations} 5 (G. Seldes ed. 1977).} In that situation, the ability of the press to
exploit their image without their consent creates a particularly irri-
tating situation. As Oscar Wilde termed it: "In the old days men had
the rack. Now they have the press."\footnote{As Jefferson Davis termed it, a public figure may demand: "All we ask is to be
let alone." \textit{The Great Quotations} 780 (G. Seldes ed. 1977).}

Therefore, it has been recommended that society support the deci-
sions of public figures not to commercialize their names whether for

\footnote{O. Wilde, \textit{The Complete Works of Oscar Wilde} 40-41 (1907).}
personal or career reasons. The right of publicity is a commercial asset which a celebrity ought to be able to use in whatever manner he or she chooses. This right entitles a celebrity to sell or keep his or her property interest in accordance with the determination of which use is best in the individual circumstances. 99

One scholar noted:

If society chooses to allow uses of names and likenesses in advertising, it might prefer that consumers not be misled about the willingness of a celebrity to associate himself with a product or service. It might give celebrities a cause of action for unconsented uses of names and likenesses in furtherance of the objective. 100

E. Prevention of Unjust Enrichment

Finally, a fifth rationale for allowing recovery is that the "sound-alike" advertiser is unjustly enriched by gaining the benefits of the celebrity image without being burdened by paying the price required by the celebrity for its use. 101 This rationale has a direct correlation with the property rationale for the right of publicity. 102 By exploiting the celebrity's identity without compensation, the advertiser reaps the benefits of the celebrity's investment in himself. The encroachment upon the property right of celebrities results in unjust enrichment. 103

The unauthorized commercial appropriation of the celebrity's identity converts potential economic value in their identity to another's advantage. The advertiser is thus unjustly enriched, reaping one of the benefits of the celebrity's investment in himself. Therefore, loss of potential financial gain for the celebrity occurs. In that vein, the advertiser usurps both the profit and control of the celebrity's public image.

It is imperative to a correct property analysis that one recognizes the celebrity image resulted from their own hard work, and that the celebrity alone should be entitled to the monetary rewards gained from the use of the image. 104

99. Comment, supra note 10, at 1717.
101. Recent Development, Inheritability of the Right of Publicity Upon the Death of the Famous, 33 Vand. L. Rev. 1251, 1261 (1980). This Recent Development, which advocates that the right of publicity is a property right, suggests that encroachment upon a property right results in unjust enrichment.
102. Property can be viewed as a means of protecting an individual from economic exploitation by others. See Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982). This commentator argues that property is not only a means toward economic expansion, but also of protecting personhood.
103. Recent Development, supra note 101, at 1261.
A considerable amount of money, time, and energy is needed to develop one's prominence in a particular field. In fact, years of labor may be required before one's skills result in the type of notoriety which permits an economic return through some sort of commercial promotion activity. Once a celebrity expends the effort to develop that property interest, he or she has the right to prevent others from using the property without permission.106

A celebrity can spend years creating an environment in which their voice is recognized as a commodity.106 Therefore, it is necessary that a celebrity be able to recover for the unauthorized commercial use of his or her distinctive voice in order to prevent the unjust enrichment of "sound-alike" advertisers.

In summary, the above mentioned policy rationales, which stem from the widely-accepted theory that the right of publicity is ultimately a property right, provide a solid basis for the legislative suggestion that follows.

V. LEGISLATIVE SUGGESTION

Based on strong policy arguments, coupled with the federal court's holding in *Midler*, this Comment suggests that the California legislature amend Civil Code section 3344(a) to include "vocal imitations."107 The proposed amended statute would read as follows:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, or engages in any vocal imitation of a distinctive celebrity voice, in any manner. . .for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or service. . .without such person's prior consent. . .shall be liable for any damages sustained by the person. . .injured as a result thereof. [Proposed amendment is set out in italics.]

This amendment would allow a celebrity to recover damages against a person who unlawfully uses an imitation of his or her voice for commercial purposes, such as in "sound-alike" advertisements. The present day situation appears to be ripe for such a statutory provision in light of the recent influx of "sound-alike" commercials in radio and television advertising.

106. *Factors*, 579 F.2d at 221.
CONCLUSION

Under California’s current interpretation of the common law right of publicity, and its statutory counterpart, a celebrity is not afforded any sort of recovery for the imitation of his or her distinctive voice in purely commercial settings. This Comment contends that such protection against the vocal imitation of a celebrity is just as warranted as the protection currently provided for visual imitations or other appropriations of that celebrity’s identity.

A celebrity can spend years creating an environment in which his or her voice is recognized as a commodity, only to have a person, who has done nothing to create the recognition, market the commodity and receive a windfall in profits. A solution would best be realized in the form of a statutory amendment to the right of publicity statute in California allowing celebrities recovery for vocal imitations. This Comment suggests that the status quo requires a quick remedy.

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