

JOHN DOE’S RIGHT OF PUBLICITY

Noa Dreymann[†]

The right of publicity secures “the inherent right of every human being to control the commercial use of his or her identity.”¹ State laws—in the form of recognized common law rights, statutes, or a combination of the two—govern the right of publicity.² Over thirty states³ recognize some form⁴ of this right, and provide a cause of action to plaintiffs who claim to suffer from what William Prosser famously articulated as “the appropriation, for the defendant’s benefit or advantage, of the plaintiff’s name or likeness.”⁵

Originally a subset of the right to privacy,⁶ the right of publicity is the product of a complicated evolution that is arguably still underway. Notably, over the past few decades, California’s right of publicity law⁷ has become a powerful tool for celebrities seeking damages for the appropriation of their identities.⁸

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[†] J.D. Candidate, 2018, University of California, Berkeley, School of Law.

1. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. Westlaw 2016).

2. *See id.* § 6:3.

3. *Id. Cf.* 2 MARK A. LEMLEY, PETER S. MENELL & ROBERT P. MERGES, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* VI-72 (2016) (revealing slight discrepancies in the number of states).

4. *See* Jennifer E. Rothman, *Rothman’s Roadmap to the Right of Publicity*, <http://www.rightofpublicityroadmap.com/> [<https://perma.cc/UJQ2-3PBT>] (last visited Jan. 22, 2017) (providing information about each state’s version, or lack thereof, of a right of publicity law).

5. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401 (1960).

6. MCCARTHY, *supra* note 1, § 1:2.

7. California law provides both a common law right of publicity and a statutory right of publicity. As outlined in *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983), a plaintiff bringing a California common law right of publicity claim must establish the following elements: (1) the defendant’s use of plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. Additionally, Cal. Civil Code § 3344(a) (1971) (amended 1984) dictates that a violator of California’s right of publicity statute is one who uses “another’s name, voice, signature, photograph, or likeness” without authorization in a commercial manner.

8. *See, e.g.*, *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996); *Midler v. Ford Motor Co.*, 849 F.2d

Though its ultimate decision may be defensible, the Ninth Circuit's reasoning in *Sarver v. Chartier*,⁹ a right of publicity case brought by a non-celebrity, exposes the dangers of failing to understand the origins, development, and justifications of the right of publicity. Ignoring earlier right of publicity cases¹⁰ and the works of important scholars,¹¹ the *Sarver* court seems blinded by the recent influx of celebrity right of publicity claims, and suggests that only celebrities are worthy of protection from right of publicity violations, at least in cases where the defendants' speech is expressive in nature. By overlooking some of the right of publicity's justifications, and misapplying others, *Sarver* may lead future courts to strip non-celebrities of a right meant for "every human being."¹² Now, more than ever, as the average person's social media presence provides easy access to her photographs, videos, and more, it is worthwhile to explore non-celebrities' ability to control the uses of their identities.

Part I of this Note recounts the history of the right of publicity. Part II elaborates on the key policy justifications for the right of publicity, and explains how courts reconcile the right of publicity with the right to freedom of expression. Part III lays out the facts of *Sarver*, and summarizes both the district court's and the Ninth Circuit's treatments of the case. Part IV analyzes the Ninth Circuit's reasoning in *Sarver*, and argues that such a line of reasoning risks jeopardizing the future of non-celebrities' right of publicity.

I. THE RIGHT OF PUBLICITY—A COMPLICATED EVOLUTION

This Part begins by describing the development of the right to privacy, a precursor to the right of publicity. It continues by, first, demonstrating the need for an independent right of publicity, and, second, shedding light on the foundation of the right of publicity doctrine. Finally, this Part provides a survey of more recent right of publicity cases—specifically, those arising out of celebrities' claims.

460 (9th Cir. 1988). This Note often refers to the totality of a person's protected aspects—her name, voice, signature, photograph, likeness, etc.—as her "identity."

9. *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016).

10. *See, e.g.*, *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

11. *See, e.g.*, Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203 (1954).

12. MCCARTHY, *supra* note 1, § 1:3.

A. THE EMERGENCE OF THE RIGHT TO PRIVACY

Since the right to privacy acted as a precursor to the right of publicity, a review of the origins of the right to privacy is essential to understanding the right of publicity. In 1890, Samuel Warren and Louis Brandeis, two distinguished Harvard Law School alumni,¹³ wrote an influential law review article,¹⁴ cited as “single-handedly” creating the theory behind privacy rights.¹⁵ Warren and Brandeis envisioned a right to privacy that protected individuals from the “mental pain and distress” brought upon by intrusions into the “sacred precincts of private and domestic life.”¹⁶ Specifically, Warren and Brandeis demanded a remedy against newspaper articles reporting gossip, and unauthorized publications of portraits.¹⁷

In 1902, over a decade after the publication of the Warren and Brandeis article, the New York Court of Appeals case, *Roberson v. Rochester Folding Box Co.*,¹⁸ rejuvenated developments in the realm of privacy rights. In *Roberson*, a woman sued a flour company for using her picture in an advertisement without obtaining her consent, causing her “great distress and suffering, both in body and mind.”¹⁹ A divided court held that there was no precedent to support the existence of a common law right to privacy.²⁰ Notably, this early case raised the same concerns with which courts have continued to grapple throughout the evolution of the right of publicity: the insurmountable difficulties inherent in “draw[ing] a line of demarcation between public characters and private characters,”²¹ as well as qualms about restricting the freedoms of press and of speech.²²

Ultimately, the public outrage that followed the *Roberson* decision²³ led the New York Legislature to enact a statute that rendered the use of the name, portrait, or picture of any person for “advertising purposes or for the purposes of trade” without her written consent a misdemeanor and a tort.²⁴

13. MCCARTHY, *supra* note 1, § 1:12.

14. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

15. MCCARTHY, *supra* note 1, §§ 1:11, 1:4.

16. Warren & Brandeis, *supra* note 14, at 195–96.

17. *Id.*

18. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

19. *Id.* at 442.

20. *Id.* at 443.

21. *Id.* at 447. The *Roberson* court, like many that have come after it, operated under a framework according to which public characters have surrendered their right to privacy.

22. *Id.*

23. Prosser, *supra* note 5, at 385.

24. N.Y. Sess. Laws, ch. 132, §§ 1–2 (1903) (amended as N.Y. Civ. Rights Law, §§ 50–51 (1921)).

The narrow statute overturned *Roberson* and allowed recovery for unauthorized commercial uses; it did not recognize a broader right to privacy.²⁵

In 1905, as discourse regarding privacy rights continued gaining momentum, *Pavesich v. New England Life Insurance Co.* provided the Georgia Supreme Court an opportunity to recognize a common law right to privacy.²⁶ The relevant facts of *Pavesich* were largely analogous to those of *Roberson*: the plaintiff, a little-known artist, sued an insurance company and a photographer for the unauthorized use of his picture in an advertisement.²⁷ In contrast to the *Roberson* court, however, the *Pavesich* court found that a right to privacy exists, and that the unauthorized commercial use of one's picture constitutes an invasion of the right.²⁸

Over the next few decades, as courts continued to grapple with cases implicating similar causes of action, the *Pavesich* case paved the way for those courts embracing a right to privacy.²⁹ In the 1930s, bolstered by the articulation of such a right in the Restatement (First) of Torts,³⁰ “the tide set in strongly in favor of recognition” of the right to privacy.³¹

25. MCCARTHY, *supra* note 1, § 1:16; *see* Arrington v. New York Times Co., 434 N.E.2d 1319, 1321 (1982) (noting that “[the statute was] drafted narrowly to encompass only the commercial use of an individual’s name or likeness and no more,” and that “the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*.”); Harriet F. Pilpel, *The Right of Publicity*, 27 BULL. COPYRIGHT SOC’Y 249, 251 (1980) (remarking that the New York statute contains “[n]ot a word about the prying into personal lives that was the basis of the Brandeis-Warren article—only a ban on commercial use, without consent.”).

26. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 78 (Ga. 1905) (adopting the *Roberson* dissent: “The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition.”).

27. *Id.* at 68–69.

28. *Id.* at 80–81.

29. *See* Prosser, *supra* note 5, at 386 (labeling *Pavesich* as the “leading case” in terms of recognition of a right to privacy). *See also* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 986 (1964) (noting that *Pavesich* “has probably been cited more often than any other case in the history of the development of the right to privacy.”).

30. RESTATEMENT (FIRST) OF TORTS § 867 (AM. LAW INST. 1939) provided that “[a] person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”

31. Prosser, *supra* note 5, at 386. *But see* Arthur L. Goodhart, *Restatement Of The Law Of Torts, Volume IV: A Comparison Between American And English Law*, 91 U. OF PA. L. REV. 487, 508 (1943) (remarking that, at the time of his writing, “[t]he number of States which [had] not as yet recognized this rule [was] still so large that it seem[ed] doubtful whether it [could] be said to represent the settled American law on the subject.”).

B. DISTINGUISHING THE RIGHT OF PUBLICITY FROM THE RIGHT TO PRIVACY

As the right to privacy became increasingly accepted, the tendency to treat what we now call the “right of publicity”³² as a subpart of the right to privacy³³ caused a large deal of confusion in the courts.³⁴ This confusion was exacerbated especially when celebrities, as opposed to non-famous individuals, brought claims of misappropriation of their identities framed as invasions of their right to privacy.³⁵ Courts associated privacy claims with dignitary harms resulting from being thrust into the limelight while longing to be “let alone.”³⁶ To celebrities’ chagrin, courts viewed celebrities as individuals who had effectively waived their right to privacy.³⁷ The 1941 privacy case, *O’Brien v. Pabst Sales Co.*,³⁸ represents one such example of the conflation of privacy claims with appropriation concerns.³⁹ In *O’Brien*, the plaintiff, a famous football player, brought an invasion of privacy claim when his photograph was used in a beer advertisement without his consent.⁴⁰ The Fifth Circuit affirmed the lower court’s finding that “no [privacy] case had been made out” because the plaintiff waived his right to privacy when he ceased being a “private person.”⁴¹

Arguing in dissent that the plaintiff was entitled to recover the reasonable value of the use of his picture,⁴² Judge Holmes opened the door

32. Loosely, the right to not have one’s identity appropriated by another.

33. See e.g., *Pavesich*, 50 S.E. at 68; RESTATEMENT (FIRST) OF TORTS § 867 (AM. LAW INST. 1939).

34. MCCARTHY, *supra* note 1, §§ 1:7, 1:25.

35. *Id.* §§ 1:7, 1:25.

36. *Id.* § 1:25.

37. Opinions written as early as 1902 and as late as 1952 reflect this notion. See, e.g., *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902) (remarking that “[a] private individual should be protected against the publication of any portrait of himself, but, where an individual becomes a public character, the case is different.”); *Pallas v. Crowley-Milner & Co.*, 54 N.W.2d 595, 597 (1952) (affirming judgment for Defendant where Plaintiff, a “show girl or model,” sought damages for the unauthorized use of her photograph in an advertisement because “[t]he testimony in the case warranted submission to the jury of the question of whether plaintiff had cast aside the cloak of privacy of the ordinary, private person, embraced a public or professional role as show girl or model and thereby waived her right to be free from an invasion of privacy . . .”).

38. *O’Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941).

39. See MCCARTHY, *supra* note 1, § 1:25.

40. *O’Brien*, 124 F.2d at 168.

41. *Id.* at 169–70 (finding that “the publicity he got was only that which he had been constantly seeking and receiving.”).

42. *Id.* at 170.

to the recognition of a separate right—the right of publicity. Judge Holmes maintained that:

[t]he right of privacy is distinct from the right to use one’s name or picture for purposes of commercial advertisement. The latter is a property right that belongs to every one; it may have much or little, or only a nominal, value; but it is a personal right, which may not be violated with impunity.⁴³

Following the footsteps of Judge Holmes, Judge Jerome Frank took “a long step in [the] direction”⁴⁴ of distinguishing between privacy and publicity rights in the 1953 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁴⁵ opinion. Writing for the *Haelan* court, Judge Jerome Frank rejected the defendant’s argument that “a man has no legal interest in the publication of his picture other than his right of privacy.”⁴⁶ Judge Jerome Frank is widely cited as coining the term “right of publicity”⁴⁷ insofar as it is used to denote the right to grant to another the exclusive right to publish one’s photograph or likeness.⁴⁸

Shortly after the *Haelan* opinion, in 1954, Professor Melville B. Nimmer published his influential *The Right of Publicity*,⁴⁹ lauded as “the foundation stone of the right of publicity.”⁵⁰ Nimmer defines the right of publicity as “the right of each person to control and profit from the publicity values which he has created or purchased.”⁵¹ Nimmer argues that a right of publicity is necessary because (1) there is a pecuniary value inherent in publicity,⁵² and (2) all other “traditional legal theories” are inadequate in protecting such “publicity values.”⁵³

43. *Id.*

44. Joseph Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1130 (1953).

45. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

46. *Id.* at 868.

47. MCCARTHY, *supra* note 1, § 1:26. *See also* Nimmer, *supra* note 11, at 204. *See* MCCARTHY, *supra* note 1, § 1:26 n.1 for other, earlier uses of the term “right of publicity.”

48. *Haelan Laboratories*, 202 F.2d at 868 (positing that “in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture,” and that “[t]his right might be called a ‘right of publicity.’”).

49. Nimmer, *supra* note 11.

50. MCCARTHY, *supra* note 1, § 1:27.

51. Nimmer, *supra* note 11, at 216.

52. *Id.* at 215–16 (pointing to the practice of paying celebrities “considerable sums” for the right to leverage aspects of their identities as evidence for this assertion).

53. *Id.* at 215.

Nimmer's article addresses the second prong of its argument—the inadequacy of other legal theories—by expanding on the then-budding notion that the doctrine of privacy fails to protect one claiming that another has appropriated her name, photograph, or likeness.⁵⁴ According to Nimmer, using the privacy doctrine to pursue such claims is fraught with obstacles.⁵⁵ These obstacles include courts' adoption, to various extents, of the idea that celebrities waive their right to privacy,⁵⁶ and the non-assignable nature of the right to privacy.⁵⁷ Accordingly, Nimmer urges that the right of publicity—unlike the right to privacy, which is a personal right—should be an assignable property right.⁵⁸ As such, Nimmer posits that “the measure of damages should be computed in terms of the value of the publicity appropriated by defendant rather than, as in privacy, in terms of the injury sustained by the plaintiff.”⁵⁹

Nimmer's article also clarifies issues with which present-day courts struggle. An important piece of wisdom that the article imparts is that while publicity values are often of “substantial pecuniary worth” only when associated with celebrities, all persons possess the right.⁶⁰ Practically, Nimmer suggests “rely[ing] upon the rule of damages” whenever famous and non-famous plaintiffs alike bring right of publicity claims:

[I]t should rather be held that every person has the property right of publicity, but that the damages which a person may claim for infringement of the right will depend upon the value of the publicity appropriated which in turn will depend in great measure upon the degree of fame attained by the plaintiff.⁶¹

After *Haelan* and Nimmer's *The Right of Publicity* distinguished between the right to privacy and the right of publicity, William Prosser's

54. *Id.* at 204 (contending that “[t]hose persons and enterprises in the entertainment and allied industries wishing to control but not prohibit the use by others of their own or their employees' names and portraits will find . . . that the right of privacy is generally an unsatisfactory means of assuring such control.”).

55. *Id.* at 204–10.

56. *Id.* at 204–06.

57. *Id.* at 209–10 (explaining that “if a prominent person is found merely to have a personal right of privacy and not a property right of publicity, the important publicity values which he has developed are greatly circumscribed and thereby reduced in value.”).

58. *Id.* at 216.

59. *Id.* See *id.* at 210–15 for Nimmer's arguments regarding the inadequacies of the doctrine of unfair competition and contract theory.

60. *Id.* at 216–17.

61. *Id.* at 217. Consistent with his aversion toward drawing “arbitrary” lines, Nimmer also cautions against dividing speech into “commercial” speech (i.e. speech that is in “connection with trade and advertising”) and other kinds of speech. *Id.*

1960 article, *Privacy*,⁶² remerged the two. Prosser divided the law of privacy into four torts, and labeled the fourth privacy tort as “appropriation.”⁶³ This tort, according to Prosser, consists of the invasion of the plaintiff’s privacy by “the appropriation, for the defendant’s benefit or advantage, of the plaintiff’s name or likeness.”⁶⁴ Prosser’s *Privacy* proved “immensely influential,”⁶⁵ and its division of the privacy right into four torts has been adopted by the Second Restatement of Torts⁶⁶ and accepted by almost all courts in the United States.⁶⁷ Cases as recent as *Eastwood v. Superior Court*—a 1983 California right of publicity claim analyzed as a “fourth category of invasion of privacy” case⁶⁸—reveal that the confusion that Prosser’s article caused has been longstanding and difficult to undo.⁶⁹

C. RECENT CALIFORNIA RIGHT OF PUBLICITY CASES—CELEBRITIES FLOOD THE COURTS

It is no surprise that California courts⁷⁰—which serve, among others, the glamorous residents of Hollywood—hear many right of publicity cases brought by celebrities. As discussed, not too long ago, celebrities complaining of the unauthorized uses of their identities often found their claims dismissed. In the recent decades, however, the right of publicity has evolved as a useful tool for celebrities seeking to counter the appropriation of their identities. Illustrating this development, this Section summarizes four notable Ninth Circuit cases in which celebrities availed themselves of the right of publicity.

1. *Midler v. Ford Motor Co. (1988)*⁷¹

In *Midler*, the famous singer and actress, Bette Midler, sued Ford Motor Company and its advertising agency for using a “sound alike” in a

62. Prosser, *supra* note 5.

63. *Id.* at 389.

64. *Id.* at 401.

65. MCCARTHY, *supra* note 1, § 1:19.

66. RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977).

67. MCCARTHY, *supra* note 1, §§ 1:19, 1:24.

68. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 346 (Ct. App. 1983).

69. *See* MCCARTHY, *supra* note 1, § 1:19 (discussing the confusion that Prosser’s analysis has caused). *See also* Lugosi v. Universal Pictures, 160 Cal. Rptr. 323, 329 (1979) (providing another example of this confusion by stating that “[t]he protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy.”).

70. Including California state courts, U.S. federal district courts of California, and the U.S. Court of Appeals for the Ninth Circuit.

71. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

commercial.⁷² After Midler refused to participate in the commercial, the defendants hired Ula Hedwig, who had previously worked as a backup singer for Midler, to sing *Do You Want To Dance* while imitating Midler's voice.⁷³ Hedwig's accurate imitation fooled many people into believing the commercial had, in fact, featured Midler's voice.⁷⁴

The court found that California's right of publicity statute, which awards damages for the appropriation of one's "voice," did not protect Midler since the defendants did not use Midler's actual voice.⁷⁵ Notwithstanding, reasoning that, by using a "sound-alike," the defendants did appropriate an attribute of Midler's identity, the court found that Midler had a California common law right of publicity cause of action.⁷⁶ Refusing to hold that "every imitation of a voice to advertise merchandise is actionable," the court limited the scope of its holding, and stated 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."⁷⁷

2. Abdul-Jabbar v. General Motors Corp. (1996)⁷⁸

In *Abdul-Jabbar*, the celebrated basketball player known as Kareem Abdul-Jabbar sued General Motors Corporation for using his given name, Lew Alcindor, in a commercial without his consent.⁷⁹ Abdul-Jabbar alleged violations of California's statutory and common law rights of publicity.⁸⁰ Finding that neither the statute, nor California's common law requires that the protected aspect of one's identity be "in common, present use," the court held that Abdul-Jabbar had alleged sufficient facts to state a claim under both causes of action.⁸¹

3. Hilton v. Hallmark Cards (2009)⁸²

In *Hilton*, Paris Hilton, the famous "flamboyant heiress," brought a California common law misappropriation of publicity claim against

72. *Id.* at 461.

73. *Id.*

74. *Id.* at 461–62.

75. *Id.* at 463.

76. *Id.*

77. *Id.*

78. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996).

79. *Id.* at 409.

80. *Id.* at 409–10. Abdul-Jabbar also alleged that GMC violated his trademark under the Lanham Act. *Id.*

81. *Id.* at 415 (internal quotation marks omitted).

82. *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010).

Hallmark Cards for selling birthday cards featuring a photograph of her head, super-imposed on a cartoon's body, along with Hilton's catchphrase: "That's hot."⁸³ Hallmark moved to strike the right of publicity claim under California's anti-SLAPP statute.⁸⁴ The Ninth Circuit found that Hallmark's card was not sufficiently transformative to entitle Hallmark to the transformative use defense as a matter of law.⁸⁵ Accordingly, the court denied Hallmark's motion to strike, and allowed Hilton to pursue her claim.⁸⁶

4. *In re NCAA Student–Athlete Name & Likeness Licensing Litig.* (2013)⁸⁷

In *In re NCAA*, Samuel Keller, a former college football player, objected to EA's use of his likeness in its video game, which featured "avatars" heavily modeled after real college players.⁸⁸ Keller filed a putative class-action complaint, claiming that EA violated his right of publicity under California's statute and common law.⁸⁹ EA, in turn, raised four affirmative defenses "derived from the First Amendment," and moved to strike the complaint under California's anti-SLAPP statute.⁹⁰ The first of these defenses was the transformative use defense.⁹¹

In considering EA's transformative use defense, the court weighed five factors⁹² that it identified in its reading of the *Comedy III Prods., Inc. v. Gary Saderup, Inc.*⁹³ opinion to determine whether EA's video game was

83. *Id.* at 899.

84. *Id.* California's anti-SLAPP statute is discussed in detail *infra*, Part III.B.

85. *Hilton*, 599 F.3d at 911.

86. *Id.* at 912.

87. *In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

88. *Id.* at 1271–72.

89. *Id.* at 1272.

90. *Id.* at 1272–73.

91. *Id.* at 1273. EA also invoked the Rogers test, the public interest test, and the public affairs exemption, but these defenses are less relevant to this Note.

92. The factors, as recited by the dissent, are: "whether: (1) the celebrity likeness is one of the raw materials from which an original work is synthesized; (2) the work is primarily the defendant's own expression if the expression is something other than the likeness of the celebrity; (3) the literal and imitative or creative elements predominate in the work; (4) the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and (5) an artist's skill and talent has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity's fame." *Id.* at 1285 (Thomas, J., dissenting).

93. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

“sufficiently transformative to obtain First Amendment protection.”⁹⁴ Ultimately, the court found that the game was not transformative as a matter of law “because it literally recreate[d] Keller in the very setting in which he has achieved renown.”⁹⁵ The Ninth Circuit proceeded to consider each of EA’s other defenses, but was not convinced by any of them, and affirmed the district court’s ruling against EA.⁹⁶

The recent litigiousness of celebrities leveraging their right of publicity seems to have influenced the *Sarver* court’s framing of the right of publicity doctrine.

II. POLICY RATIONALES FOR THE RIGHT OF PUBLICITY

Several rationales—including fruits of labor, incentive, unjust enrichment, right to self-definition, maximizing the value of identities, and consumer protection—may justify the recognition and enforcement of the right of publicity. This Part first surveys the merits and faults of the right’s main justifications, and then discusses the tension between the right of publicity and the First Amendment’s protection of the freedom of expression.

A. FRUITS OF LABOR

In *The Right of Publicity*, Nimmer argues that the right of publicity is necessary because, in its absence, “persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them.”⁹⁷ Nimmer rests his argument on the “first principle of Anglo-American jurisprudence,” according to which, “every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.”⁹⁸ Courts and additional scholars often endorse this view.⁹⁹

94. *In re NCAA*, 724 F.3d at 1274–79.

95. *Id.* at 1271, 1279. *But see id.* at 1284–90 (Thomas, J., arguing in dissent that the First Amendment protects EA from liability).

96. *Id.* at 1271, 1284.

97. Nimmer, *supra* note 11, at 216.

98. *Id.*

99. *See, e.g., In re NCAA*, 724 F.3d at 1281 (framing the plaintiff’s claim as one concerning the unauthorized appropriation of the plaintiff’s “talent and years of hard work on the football field”); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (“It is this court’s view that a celebrity has a legitimate proprietary interest in his public personality. 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.”); James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973)

Taking a more nuanced position, some courts and scholars emphasize that other people and factors—in addition to an individual’s labor—contribute to the value of the individual’s identity.¹⁰⁰ One such scholar, Michael Madow, argues that the existence of external factors contributing to one’s fame is such that “a labor-based moral argument for the right of publicity loses much of its initial appeal.”¹⁰¹ However, the notion that one’s labor alone may not explain one’s success does not necessarily undermine the persuasiveness of the “fruits of labor” rationale.¹⁰²

B. INCENTIVE

The incentive justification posits that granting individuals the exclusive rights to their identities incentivizes them to “undertake socially enriching activities which require entering the public scene.”¹⁰³ While many courts readily accept this justification,¹⁰⁴ different scholars have varying interpretations of what it is, exactly, that the right of publicity is supposed to incentivize.¹⁰⁵ Roberta Kwall argues in favor of the right of publicity, essentially, because it incentivizes people to take the steps necessary for transforming into celebrities who are capable of commercializing their identities.¹⁰⁶ Specifically, Kwall contends, the right of publicity is beneficial

(contending that “[s]ince the primary advertising value of a celebrity’s personality was created through the work and sacrifice of the celebrity, that value could constitute an interest that the law should protect.”).

100. See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 975 (10th Cir. 1996) (stating that “[c]elebrities . . . are often not fully responsible for their fame”); Leslie A. Kurtz, *Fictional Characters and Real People*, 51 U. LOUISVILLE L. REV. 435, 459 (2013) (positing that “[c]elebrities may be the ones most responsible for creating valuable public personae,” but citing “the skills and efforts of many other people,” the audience’s curiosity, and “time and chance” as likewise “involved” in the process).

101. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 182 (1993).

102. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *as amended* (Aug. 19, 1992) (finding that “[c]onsiderable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit,” and that “[t]he law protects the celebrity’s sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.”).

103. MCCARTHY, *supra* note 1, § 2:6.

104. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (“[T]he protection provides an economic incentive for [people] to make the investment required to produce a performance of interest to the public.”); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J., dissenting); *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697, 705 (Ga. 1982) (“Recognition of the right of publicity rewards and thereby encourages effort and creativity.”).

105. MCCARTHY, *supra* note 1, § 2:6.

106. See generally Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1 (1997).

for its ability to: counteract the “disadvantages of celebrity status”;¹⁰⁷ motivate people to undertake the “intellectual, emotional, and physical effort” entailed in “constructing the celebrity persona”;¹⁰⁸ reward celebrities’ “individualism”;¹⁰⁹ and foster the development of “role models and surrogate communities.”¹¹⁰

J. Thomas McCarthy, on the other hand, argues that upholding the right of publicity of only those who are “consciously” driven by the prospect of licensing their identities for commercial gain would be too “narrow” of an application.¹¹¹ Instead, he contends, the right of publicity may find its justification in its potential ability to “marginally encourage”¹¹² people to pursue any and all “socially enriching actions.”¹¹³ McCarthy’s argument rests on the assumption that valuable achievements inevitably lead to some degree of prominence.¹¹⁴ The fear that others might capitalize on one’s prominence in uncontrollable ways may chill motivation to undertake beneficial endeavors; McCarthy argues that the right of publicity should help prevent such a scenario.¹¹⁵

107. *Id.* at 35–36 (listing invasions of privacy, restriction of personal freedoms, uncertainty regarding the trustworthiness of those around them, and lesser protections against defamation as these “disadvantages”).

108. *Id.* at 41.

109. *Id.* at 41–42 (“Rewarding [celebrities’] efforts at differentiation is entirely consistent with America’s long-standing respect for individualism. As a society, we value hard work, and we encourage people making their mark by developing a persona that somehow stands out from the crowd.”).

110. *Id.* at 47–51 (countering the arguments of those who—citing its “shallowness and greed”—oppose incentivizing the cultivation of celebrity culture, Kwall maintains that “[t]hese criticisms overlook the fact that celebrity culture fills some critical needs in our society . . . it is important to examine the strong need Americans have for both role models and surrogate communities, and the critical role these needs play in our society’s fascination with those who have achieved fame.”).

111. MCCARTHY, *supra* note 1, § 2:6.

112. McCarthy concedes that it is impossible to “quantify what we gain by giving an additional legal inducement such as a right of publicity.” *Id.*

113. *Id.* (citing *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994), which mirrors this argument: “Protecting one’s name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage.”).

114. *See* MCCARTHY, *supra* note 1, § 2:6.

115. *Id.* McCarthy illustrated this notion with the following example: “The physician who finds a cure for a disease may think twice about writing a description of the discovery in laymen’s terms for a newspaper, fearing that the resulting prominence will result in crass commercialization of his or her name for commercial purposes, which is uncontrollable unless there exists some legal right resembling a right of publicity.” *Id.* This example leads one to wonder whether the right of publicity may encourage only the act of describing “the discovery in laymen’s terms for a newspaper,” which is but marginally beneficial to

Rejecting the “incentive” rationale altogether, Madow takes issue with the inability to quantify the right of publicity’s effect of increasing the “effort, creativity, and achievement” available for society’s enjoyment.¹¹⁶ Madow argues that the right of publicity may only slightly increase,¹¹⁷ if not decrease,¹¹⁸ the amount of this kind of beneficial¹¹⁹ behavior. Madow cites: the notion that the right of publicity protects merely a “collateral source of [celebrities’] income”;¹²⁰ the handsome compensations most celebrities enjoy regardless of the right of publicity;¹²¹ and non-economic motivations to succeed¹²² as reasons for which the right of publicity is largely inconsequential for incentivizing celebrities’ activities. Moreover, Madow argues, “in a world without the right of publicity,” celebrities might have created and preformed more than they currently do “in order to make up for the lost collateral income.”¹²³ Thus, Madow concludes, society may abolish the right of publicity without fear that celebrities’ “cultural output” will suffer.¹²⁴

C. UNJUST ENRICHMENT

Another oft-used rationale for the right of publicity is that “[w]hen one makes an unauthorized use of another’s identity for his own commercial

society, or if it may play a role in inducing the physician to discover the cure in the first place.

116. Madow, *supra* note 101, at 207–15. McCarthy concedes this point, *supra* note 112.

117. Madow, *supra* note 101, at 208–11 (“[T]here are a number of reasons to believe that the incentive effect of the right of publicity is in fact very slight.”).

118. *Id.* at 211–12 (“[I]t is at least possible, if not likely, that in a world without a right of publicity entertainers would actually be *more*, not less, active and productive.”) (emphasis in original).

119. Madow doubts the basic premise that celebrities’ activities are beneficial, but assumes it to be true, *arguendo*. *Id.* at 215–16 (qualifying his argument: “If we assume further that [these activities are] worth something to someone”).

120. *Id.* at 209 (comparing the right of publicity to copyright law, which “directly protects the primary, if not only, source of income of writers.”). *See also* *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996) (recognizing “that publicity rights do provide some incentive to achieve in the fields of sports and entertainment,” but noting that “the inducements generated by publicity rights are not nearly as important as those created by copyright and patent law.”).

121. Madow, *supra* note 101, at 209–10. *See also* *Cardtoons*, 95 F.3d at 974 (“[T]he additional inducement for achievement produced by publicity rights are often inconsequential because most celebrities with valuable commercial identities are already handsomely compensated.”).

122. Madow, *supra* note 101, at 214–15.

123. *Id.* at 211–12.

124. *Id.* at 208, 212, 215. For a discussion of whether society should seek to incentivize this sort of activities in the first place, see *id.* at 215–19.

advantage, he is unjustly enriched, having usurped both profit and control of that individual's public image."¹²⁵ This rationale is perhaps simpler than the "fruits of labor" rationale, which relies on the assumption that one deserves, at least to some extent, the value of one's identity. In practice, Person A normally pays for the right to benefit from Person B's belongings or skills, regardless of whether Person B deserved these belongings or skills in the first place. Under the "unjust enrichment" rationale, the right to profit from another's identity is no different, and should require compensation, regardless of desert.¹²⁶

In *Zacchini v. Scripps-Howard Broad. Co.*,¹²⁷ the Supreme Court's sole review of the right of publicity's constitutionality,¹²⁸ this rationale was key to the decision that upholding the plaintiff's right of publicity claim violated neither the First, nor the Fourteenth Amendments.¹²⁹ The *Zacchini* plaintiff, a "human cannonball" performer whose entire performance was videotaped and shown on a television news program without his consent, brought an Ohio common law right of publicity claim against the broadcasting company.¹³⁰ Citing Harry Kalven,¹³¹ the Supreme Court asserted that "[t]he rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will."¹³² Reasoning that the effect of a public broadcast of a performance is tantamount to preventing a performer from charging an admission fee, the Court continued quoting Kalven, and stated that "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."¹³³

Similarly, some of the more recent Ninth Circuit cases summarized *supra* evoked the "unjust enrichment" rationale in upholding the respective plaintiffs' right of publicity. In *Midler*, pointing out that the defendants benefitted from a voice that sounded like that of Midler—while avoiding

125. *Lugosi v. Universal Pictures*, 160 Cal. Rptr. 323, 339 (1979) (Bird, C.J., dissenting).

126. See Harry Kalven Jr., *Privacy in Tort Law—Were Warren & Brandeis Wrong?*, 31 L. & CONTEMP. PROBS 326, 331 (1966) (stating that "[t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment," and that "[n]o social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay.").

127. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

128. MCCARTHY, *supra* note 1, § 1:33.

129. *Zacchini*, 433 U.S. at 578–79.

130. *Id.* at 562.

131. Kalven, *supra* note 126, at 331.

132. *Zacchini*, 433 U.S. at 576.

133. *Id.*

the high rate Midler would have probably charged had she agreed to participate in the commercial—the court suggested that the defendants were unjustly enriched.¹³⁴

Labeling the “unjust enrichment” rationale as “a bit quaint,” Madow attempts to refute it using three arguments.¹³⁵ First, Madow points out that the plaintiffs in most right of publicity cases have themselves appropriated others’ works, styles, and trail-blazing efforts, and have thus, too, “enjoy[ed] something of a windfall.”¹³⁶ Second, Madow maintains that “there is still no general common law prohibition against benefiting from the commercial efforts of others.”¹³⁷ According to Madow, absent a countervailing policy rationale, intangibles enter the public domain once they are voluntarily placed in the market.¹³⁸ This “presumption in favor of free appropriability of intangibles,” Madow continues, is meant to encourage incremental creativity and progress, and reflects the recognition of the nonrivalrous nature of many intangibles.¹³⁹ Third, Madow argues that, oftentimes, those accused of violating others’ right of publicity “add something of their own—some humor, artistry, or wit—to whatever they ‘take,’” thereby contributing to the production of something of value.¹⁴⁰

134. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (asking rhetorically: “Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler’s voice was not of value to them?” and finding that “[w]hat they sought was an attribute of Midler’s identity. Its value was what the market would have paid for Midler to have sung the commercial in person.”). *See also* *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996) (“To the extent GMC’s use of the plaintiff’s birth name attracted television viewers’ attention, GMC gained a commercial advantage.”).

135. Madow, *supra* note 101, at 198.

136. *Id.* at 196–200. However, this argument conflates the “fruits of labor” rationale with that of unjust enrichment, a point which Madow recognizes: “[a supporter of the right of publicity] might say that what is morally problematic about unauthorized commercial appropriation is not so much that the celebrity created her image all by herself and thus deserves to control it, but that the appropriator . . . had no hand in its creation at all. On this view, the reason the law ought to give a celebrity a right of property in the commercial value of her persona is that society has a strong and independent moral interest in preventing people from free riding.” *Id.* at 200.

137. *Id.* at 201 (emphasis omitted).

138. *Id.* This argument does not resolve cases where the intangible was not voluntarily placed in the market. For example, it does not resolve the case where someone takes a person’s photograph (the tangible form of one’s intangible image) without the person’s consent, and uses it in an advertisement.

139. *Id.*

140. *Id.* at 204 (emphasis in original). In such cases, the defendants may benefit from the transformative use defense. *See* *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001) (explaining that it formulates “essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds

D. RIGHT TO SELF-DEFINITION

Rejecting a string of possible rationales for the right of publicity,¹⁴¹ Mark P. McKenna argues that it is a person's right to autonomous self-definition that justifies publicity rights.¹⁴² McKenna worries that "[b]ecause the things with which individuals choose to associate reflect the way they wish to be perceived, unauthorized use of one's identity in connection with products or services threatens to define that individual to the world."¹⁴³ Further, because the individual alone bears the emotional and economic costs of others' perceptions of her, the individual "has an interest in controlling the uses of her identity."¹⁴⁴

Recognizing celebrities' interest in self-definition, Kwall, too, maintains that the right of publicity is instrumental for "provid[ing] celebrities with a vehicle for maintaining control over how their constructs are presented to the public."¹⁴⁵ The Ninth Circuit has considered celebrities' rights to self-definition in upholding their right of publicity claims. In *Waits v. Frito-Lay, Inc.*, for example, the court accorded weight to Tom Waits's testimony that his refusal to endorse products constituted "part of [the] character and personality and image" that he has "cultivated."¹⁴⁶

McKenna, however, notes that the interest in autonomous self-definition is equally "relevant" for celebrities and non-celebrities.¹⁴⁷ The appropriation of a celebrity's identity usually leads third parties to believe that the celebrity is sponsoring or endorsing a product.¹⁴⁸ Non-celebrities' right of publicity claims, McKenna posits, "might go even further because non-celebrities have a broader range of interests at stake."¹⁴⁹ McKenna lists

significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.").

141. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 245–79 (2005) (rejecting the idea that celebrity identity be protected as a property right; the "unjust enrichment" rationale; labor-based justifications; allocative efficiency arguments; and a Kantian property theory).

142. *Id.* at 294 ("It is that interest, and only that interest, that the law should seek to protect.").

143. *Id.*

144. *Id.* at 229.

145. Kwall, *supra* note 106, at 36–37.

146. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104 (9th Cir. 1992), *abrogated by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

147. McKenna, *supra* note 141, at 279. *See also id.* at 285–88.

148. *Id.* at 285.

149. *Id.*

anonymity, secrecy, and solitude as possible interests that a non-celebrity may seek to protect.¹⁵⁰

The “right to self-definition” rationale often seems forgotten in an era in which economic justifications appear to trump dignitary ones. Some states, however, in line with McKenna’s scholarship, cherish each citizen’s right to autonomous definition, and have shaped their right of publicity laws accordingly. For example, in the interest of allowing its citizens to control the cultivation of their reputations, Arkansas’s right of publicity statute seeks to protect citizens from all walks of life against the unauthorized uses of their identities.¹⁵¹

E. MAXIMIZING THE VALUE OF IDENTITIES

Richard A. Posner contends that a “perfectly good economic reason” justifies the enforcement of the right of publicity.¹⁵² Assigning every individual the rights to her identity, he argues, assures that the entity to which an identity’s aspect is most valuable will be the entity that attains the right to publish it.¹⁵³ According to this rationale, surrendering individuals’ names, photographs, and likenesses to the public domain would lead to their repeated publication, and, consequentially, to the diminution of their value as they no longer attract the attention that advertisers covet.¹⁵⁴ By contrast, creating artificial scarcity such that not all stove campaigns are free to use the photograph of a certain star chef, for example, helps maintain the value of the chef’s identity.¹⁵⁵

150. *Id.* at 286.

151. The Frank Broyles Publicity Rights Protection Act of 2016 reads: “The General Assembly finds that citizens of this state: (1) Are renowned for their hard work and accomplishments in many areas that contribute to the public health, welfare, and pursuit of happiness; (2) Often spend most of their lives developing and maintaining reputations of honesty and integrity; (3) Have a vested interest in maintaining the memory of personal traits that characterize them and their accomplishments; and (4) Should have the use of their names, voices, signatures, photographs, and likenesses protected for their benefit and the benefit of their families.” Frank Broyles Publicity Rights Protection Act of 2016, 2016 Ark. Acts (codified at Ark. Code Ann. § 4–75–1102).

152. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978).

153. *Id.* Posner expresses this idea by discussing, specifically, the assignment of a property right in a photograph to the person photographed, such that the advertiser who most values the photograph will purchase the rights to it. *Id.* From this example, this Note extrapolates Posner’s economic justification to the right of publicity at large. *But see* Madow, *supra* note 101, at 223–24 (arguing that transaction costs may prevent the publishing rights from ending up with the advertiser(s) who truly values them most).

154. *See* *Matthews v. Wozencraft*, 15 F.3d 432, 437–38 n.2 (5th Cir. 1994). *See also* Madow, *supra* note 101, at 220 (mockingly labeling this line of thinking as “The Tragedy of the Celebrity Commons?”).

155. *See* *Matthews*, 15 F.3d at 437–38.

Courts and scholars have countered that this economic efficiency rationale does not apply to all right of publicity cases with equal force. The *Cardtoons, L.C. v. Major League Baseball Players Ass'n* opinion remarks that the economic efficiency rationale is not as persuasive outside of the advertising context.¹⁵⁶ Similarly, Madow uses the example of “Madonna T-Shirts,” to contend that the frequent and widespread use of a likeness in the merchandising context, for example, is not as likely to decrease the value of the identity used.¹⁵⁷ To the contrary, the omnipresence of the T-shirts may even increase the identity’s value as more people desire the popular item as well as related “paraphernalia.”¹⁵⁸

F. CONSUMER PROTECTION

James M. Treece argues that the recognition of the right of publicity functions as a “private law mechanism for advertising regulation.”¹⁵⁹ Allowing right of publicity claims, he contends, not only protects those making the claims, but also helps assure that consumers are not “misled about the willingness of a celebrity to associate himself with a product or service.”¹⁶⁰ Treece maintains that, absent other means to differentiate between competing firms’ services, a consumer’s assumption that a responsible celebrity “would not associate himself, even for a fee, with a firm that provides inferior service” may influence her to buy the advertising firm’s service, as opposed to the competing firm’s service.¹⁶¹ Therefore, the argument goes, a consumer’s ability to rely on such logic in making a rational choice would be hindered in the absence of the right of publicity, which serves to assure that the celebrity was, in fact, willing to associate himself with the service.¹⁶²

Taking this rationale to an extreme, Stacey L. Dogan and Mark A. Lemley suggest limiting the right of publicity to “circumstances in which the use of an individual’s name or likeness in connection with the sale of a product is likely either to confuse consumers or to dilute the significance of

156. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 975 (10th Cir. 1996) (referencing Madow, *supra* note 101, at 221–22).

157. Madow, *supra* note 101, at 222.

158. *Id.*

159. Treece, *supra* note 99, at 647.

160. *Id. Contra In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1279–82 (9th Cir. 2013) (rejecting this “win-win” scenario, and asserting that “[t]he right of publicity protects the *celebrity*, not the *consumer*”) (emphasis in original).

161. Treece, *supra* note 99, at 645.

162. *See id.* at 647.

a famous name.”¹⁶³ Thus curtailing the right of publicity, they argue, would “avoid some of the worst abuses of the right, limit the conflict between the right of publicity and First Amendment principles, and put the right on a more solid conceptual grounding.”¹⁶⁴ These scholars believe that, while “the overlap [between the goals of trademark law and those of the right of publicity] is not perfect,” both laws promote the “same core goals,” and should use the same framework.¹⁶⁵

Madow, on the other hand, rejects the consumer protection rationale as a justification for the right of publicity.¹⁶⁶ Maintaining that consumers do not take the time to engage in the thought process described by Treece, Madow disagrees with the idea that the association between a product or service and a celebrity heavily influences a consumer’s purchasing decision.¹⁶⁷ Alternatively, Madow contends that even if some consumers do allow such associations to influence their purchasing decisions, “it is not clear that the ‘rationality’ of their consumer purchase decisions is thereby enhanced.”¹⁶⁸ Madow maintains that the assumption that celebrities sufficiently research the products and services they promote is often misguided, and that this faulty assumption renders the rationality of such purchasing decisions merely illusory.¹⁶⁹ Finally, Madow rejects the consumer protection rationale as one that employs circular reasoning: consumers assume that celebrities consent to the use of their identities in advertisements because of the existing law and business customs; were these to change such that it is clear that a celebrity’s consent is not necessary, consumers would no longer assume voluntary associations, and would not be misled by the use of an identity in the promotion of a product or service.¹⁷⁰

163. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1166 (2006).

164. *Id.*

165. *Id.*

166. Madow, *supra* note 101, at 236.

167. *Id.* at 230 (citing *Pacific Dunlop Ltd. v. Hogan*, 87 A.L.R. 14, 45 (Fed. Ct. of Austl., Gen. Div. 1989)) (arguing that the “association of a celebrity image with a product proceeds more subtly to foster favourable inclination towards it, a good feeling about it, an emotional attachment to it”) (internal quotation marks omitted).

168. Madow, *supra* note 101, at 230.

169. *Id.* at 230–31.

170. *Id.* at 235–36.

G. THE TENSION BETWEEN THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

Notwithstanding the various rationales justifying the right of publicity, enforcing the right of publicity is fraught with concerns about unduly limiting the freedom of expression.¹⁷¹ This Section uses two cases to illustrate how courts grapple with these often-conflicting rights. Specifically, in deciding whether a given defendant's freedom of expression trumps a given plaintiff's right of publicity, courts may assess the transformative value of the work in question, or attempt to classify the defendant's speech as either commercial or expressive.

1. *The Work's Transformative Value*

In *Comedy III Prods., Inc. v. Gary Saderup, Inc.*,¹⁷² the Supreme Court of California devised a test to balance between the state interest in upholding an individual's right of publicity and an author's interest in free expression.¹⁷³ This balancing test has proven useful to the Ninth Circuit in cases where it sought to reconcile these rights.¹⁷⁴

In *Comedy III*, the owner of all rights to the famed comedy act, The Three Stooges, brought a right of publicity action against an artist who used his own charcoal drawings of The Three Stooges to create and sell lithographs and T-shirts "bearing a likeness of The Three Stooges."¹⁷⁵ The artist's contention that his conduct was "protected by the constitutional guaranty of freedom of speech"¹⁷⁶ prompted the Supreme Court of California to formulate a "balancing test between the First Amendment and the right of publicity."¹⁷⁷

Borrowing the first factor of copyright law's fair use defense¹⁷⁸—the purpose and character of the use¹⁷⁹—the court articulated its balancing test as one that is "based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere

171. These are the same concerns the *Roberson* opinion anticipated in 1902. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902).

172. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

173. *Id.* at 799.

174. *See, e.g., In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1281 (9th Cir. 2013); *Hilton v. Hallmark Cards*, 599 F.3d 894, 909 (9th Cir. 2010).

175. *Comedy III*, 21 P.3d at 800–01.

176. *Id.* at 801.

177. *Id.* at 799.

178. *Id.* at 807–08.

179. 17 U.S.C. § 107(1) (2012).

celebrity likeness or imitation.”¹⁸⁰ In other words, when grappling with a plaintiff’s right of publicity and a defendant’s freedom of expression, a court should assess whether the work “containing [the plaintiff’s] likeness is so transformed that it has become primarily the defendant’s own expression rather than the [plaintiff’s] likeness.”¹⁸¹ Whereas the state’s interest in protecting a person’s right of publicity outweighs an artist’s expressive interest in a less transformative work, an artist’s expressive interest in a highly transformative work outweighs the state’s interest in upholding a person’s right of publicity.¹⁸² Because the defendant’s work did not add any “significant transformative or creative contribution” to its “literal, conventional depictions of The Three Stooges,” the court upheld the plaintiff’s right of publicity at the expense of the defendant’s freedom of expression.¹⁸³

The court also provided a “subsidiary inquiry” for courts struggling to determine whether a work is sufficiently transformative: whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.”¹⁸⁴ When the work does not owe its value (primarily) to the person depicted—but rather to the artist’s “creativity, skill, and reputation”—the person’s right of publicity claim must generally give way to the artist’s freedom of expression.¹⁸⁵ However, the conclusion that the work’s value does stem from the identity of the person depicted therein does not necessarily suggest that the work is outside the bounds of First Amendment protection.¹⁸⁶

2. *The Commercial or Expressive Nature of the Speech*

Though drawing a line of demarcation between commercial and expressive speech would be both difficult¹⁸⁷ and ill-advised,¹⁸⁸ courts traditionally characterize commercial speech as speech that “does no more than propose a commercial transaction.”¹⁸⁹ Commercial speech that

180. *Comedy III*, 21 P.3d at 799.

181. *Id.* at 809. The original language uses the word “celebrity” instead of “plaintiff.”

182. *Id.* at 808.

183. *Id.* at 811.

184. *Id.* at 810.

185. *Id.*

186. *Id.*

187. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (stating that the “boundary between commercial and noncommercial speech has yet to be clearly delineated”).

188. See *Nimmer*, *supra* note 11, at 217.

189. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (internal quotation marks omitted).

“concern[s] lawful activity,” and that is not misleading benefits from First Amendment protection,¹⁹⁰ but to a lesser extent than does expressive speech.¹⁹¹ The Ninth Circuit case, *Hoffman v. Capital Cities/ABC, Inc.*,¹⁹² illustrates the relevance of the commercial or expressive nature of the defendant’s speech to the weighing of the state interest in upholding a plaintiff’s right of publicity against a defendant’s interest in freedom of expression.

In 1997, Los Angeles Magazine published an article featuring altered versions of still photographs taken from films.¹⁹³ The stills were altered such that the actors in the photographs appeared to be wearing Spring 1997 fashions.¹⁹⁴ One of the photographs, taken from the film *Tootsie*, retained the head of the renowned actor, Dustin Hoffman, as it appeared in the original still, but replaced Hoffman’s body with the body of a male model “in the same pose, wearing a spaghetti-strapped, cream-colored, silk evening dress and high-heeled sandals.”¹⁹⁵ The photograph’s caption identified the designers of the dress and the sandals, respectively.¹⁹⁶

Hoffman claimed, in relevant part, that the magazine’s publication of the altered photograph misappropriated his name and likeness, violating both California’s common law right of publicity and California’s statutory right of publicity.¹⁹⁷ Hoffman argued that the photograph constituted “pure commercial speech,” and thus merited a lesser level of constitutional protection.¹⁹⁸ Although the photograph’s caption identified the designers of the depicted fashions, the court found that “[v]iewed in context, the article as a whole [was] a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors.”¹⁹⁹ Thus, the court reasoned, the article was more than “a simple advertisement.”²⁰⁰

190. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

191. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (“[T]he State may regulate some types of commercial advertising more freely than other forms of protected speech.”).

192. *Hoffman*, 255 F.3d 1180.

193. *Id.* at 1183.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* Hoffman claimed that the publication also violated the California unfair competition statute, Business and Professions Code § 17200, and the federal Lanham Act, 15 U.S.C. § 1125(a). *Id.*

198. *Id.* at 1184–85.

199. *Id.* at 1185.

200. *Id.* at 1186.

Reversing the district court's decision, the Ninth Circuit held that the defendant was "entitled to the full First Amendment protection awarded noncommercial speech," and directed judgment in favor of the defendant.²⁰¹

In *Sarver*, the Ninth Circuit discussed some of the right of publicity's policy rationales described in this Part. The court likewise assessed the transformative value of the defendants' work, as well as the extent to which the work constituted expressive speech. Ultimately, the court found the defendants' interest in free speech to trump the state interest in upholding the plaintiff's right of publicity.

III. SARVER V. CHARTIER—CASE SUMMARY

Following a string of right of publicity cases brought by Hollywood stars, *Sarver v. Chartier*²⁰² presented the Ninth Circuit with an opportunity to explore how California's right of publicity applies to non-celebrities. Unfortunately, the court did not heed the call to delve into the history behind the right and the policy rationales that may support upholding an ordinary person's right of publicity. Instead, the court performed a perfunctory balancing test between the state's interests in upholding the defendants' freedom of expression and the plaintiff's right of publicity. Specifically, the court failed to consider a number of important motivations for upholding anyone's right of publicity. Further, the court distorted the motivations that it did consider such that they justified upholding only celebrities' right of publicity claims. Given the occasion to adjudicate a non-celebrity's right of publicity claim, future courts should grapple with the right of publicity's scope while refraining from relying solely on the *Sarver* analysis.

A. THE FACTS OF *SARVER*

Plaintiff Jeffrey Sarver is an army sergeant who, after years of service in the United States Army, served as an Explosive Ordnance Disposal (EOD) technician during the Iraq War.²⁰³ Mark Boal, a journalist working for *Playboy* magazine, shadowed Sarver, interviewed him a number of times, and "took photographs and video of him while he was on and off duty."²⁰⁴ In 2005, Boal published an article titled *The Man in the Bomb Suit*.²⁰⁵ The *Playboy* article "focused on Sarver's life and experiences in

201. *Id.* at 1189.

202. *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016).

203. *Id.* at 896.

204. *Id.*

205. Mark Boal, *The Man in the Bomb Suit*, PLAYBOY, Sept. 2005, at 70.

Iraq” and featured two photographs of him.²⁰⁶ Sarver “allege[d] that he never consented to the use of his name and likeness” in the article, and that he especially objected to certain portions of it.²⁰⁷ Boal went on to write the screenplay for the 2009 film, *The Hurt Locker*.²⁰⁸ Sarver claimed that the filmmakers of *The Hurt Locker* based the film’s main character on his life and experiences without obtaining his consent.²⁰⁹ To correct this perceived wrong, Sarver brought a cause of action for, in relevant part, right of publicity and misappropriation of his name and likeness against the filmmakers.²¹⁰ The defendants moved to strike Sarver’s complaint under California’s anti-SLAPP statute.²¹¹

B. BACKGROUND ON CALIFORNIA’S ANTI-SLAPP STATUTE

Under the California anti-SLAPP (strategic lawsuit against public participation) statute,²¹² a court may, under certain conditions, grant a special motion to strike causes of action that arise from acts that are “in furtherance” of the right of petition or free speech under the United States Constitution or the California Constitution.²¹³ For the court to strike the cause of action, the defendant’s act must also be connected with a public issue, and the plaintiff must have failed to establish a probability of success on the claim’s merits.²¹⁴ The California Legislature enacted the statute to “allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation.”²¹⁵

The anti-SLAPP analysis therefore comprises three inquiries: (1) whether the defendant’s acts constituted the exercise of free speech; (2) whether the defendant’s acts were connected with a public issue; and (3) whether the plaintiff has established a probability of success on the claim’s merits. In *Sarver*, and on other occasions,²¹⁶ the Ninth Circuit merged the first two inquiries into one.²¹⁷

206. *Sarver*, 813 F.3d at 896.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Cal. Civ. Proc. Code § 425.16 (West 2014).

213. Cal. Civ. Proc. Code § 425.16(b)(1) (West 2014).

214. *Id.*

215. *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001).

216. *See, e.g., In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1272 (9th Cir. 2013) (“We evaluate an anti-SLAPP motion in two steps.”).

217. *See Sarver v. Chartier*, 813 F.3d 891, 901 (9th Cir. 2016) (stating that it “evaluate[s] anti-SLAPP motions in *two* steps” (emphasis added)).

C. THE DISTRICT COURT OPINION

In *Sarver v. Hurt Locker LLC*,²¹⁸ the Central District of California performed an in-depth anti-SLAPP analysis that led to the dismissal of Sarver's right of publicity claim.²¹⁹ The court began by asserting that the "[d]efendants have easily met the first prong of showing that they were engaged in protected speech."²²⁰ Next, concluding that Sarver's contribution to the Iraq war as an outstanding EOD technician was "connected to an issue of public interest," the court found the defendants to "have also met their burden of demonstrating the second prong that their conduct is connected to a public issue."²²¹

Lastly, the court found that the defendants' successful "transformative use" defense barred Sarver from showing a probability of prevailing on his right of publicity claim.²²² Noting that "California courts have analyzed misappropriation claims brought by individuals who do not claim celebrity status,"²²³ the court methodically verified that the film did not violate Sarver's right of publicity. Citing *Comedy III*, the court explained that, to "distinguish between forms of artistic expression protected by the First Amendment and those that must give way to the right of publicity," the California Supreme Court has "adopted" the "transformative use" defense from copyright law's fair use analysis.²²⁴ The court found that the defendants "unquestionably contributed significant distinctive and expressive content" to the character of the film's protagonist, and that "a significant amount of original expressive content was inserted in the work through the writing of the screenplay, and the production and direction of the movie."²²⁵ The court concluded that the character of the film's protagonist, "even if modeled after [Sarver]," was "so transformed that it ha[d] become primarily the defendant's own expression rather than [Sarver's] likeness."²²⁶ Moreover, the court found that "the value of *The Hurt Locker* unquestionably derived from the creativity and skill of the writers, directors, and producers who conceived, wrote, directed, edited,

218. *Sarver v. Hurt Locker LLC*, No. 2:10-CV-09034-JHN, 2011 WL 11574477 (C.D. Cal. Oct. 13, 2011).

219. *Id.* at *4–7.

220. *Id.* at *4.

221. *Id.* at *4–5.

222. *Id.* at *6–7.

223. *Id.* at *5.

224. *Id.* at *6 (internal quotations omitted).

225. *Id.* at *7.

226. *Id.*

and produced it,” and not from Sarver’s identity.²²⁷ Accordingly, the court held that no reasonable trier of fact could conclude that *The Hurt Locker* was not a transformative work, and dismissed Sarver’s right of publicity claim.²²⁸ The court then proceeded to dismiss Sarver’s defamation, false light and invasion of privacy, breach of contract, intentional infliction of emotional distress, fraud, and negligent misrepresentation claims.²²⁹

D. THE NINTH CIRCUIT’S REASONING AND HOLDING

Upon performing its own anti-SLAPP analysis, the Ninth Circuit affirmed the district court’s decision to grant the defendants’ anti-SLAPP motion.²³⁰ First, the court inquired into whether the defendants had established that their film furthered their constitutional right of petition or free speech in connection with a public issue.²³¹ Upon holding that the defendants “satisfied the public interest inquiry,”²³² the court assessed whether Sarver had established a reasonable probability of prevailing on his claims.²³³

The *Sarver* court declined to engage with the elements of a right of publicity claim, holding instead that the “dispositive” issue was whether allowing Sarver to pursue his right of publicity action would infringe the defendants’ constitutional right to free speech.²³⁴ The court found that the defendants’ film constituted “speech that is fully protected by the First Amendment.”²³⁵ The court further found that a right of publicity claim attacking this kind of speech would be “presumptively unconstitutional.”²³⁶ Distinguishing Sarver from similarly situated celebrity plaintiffs, the court reasoned that the right of publicity did not motivate Sarver to lead the life that he led, and that Sarver did not work to create a persona bearing economic value.²³⁷ Thereupon, the court concluded that Sarver could not

227. *Id.*

228. *Id.*

229. *Id.* at *8–12.

230. *Sarver v. Chartier*, 813 F.3d 891, 906 (9th Cir. 2016).

231. *Id.* at 901.

232. *Id.* at 902.

233. *Id.* at 901–03.

234. *Id.* at 903. The court thus used the anti-SLAPP statute’s third inquiry (reasonable probability of success) to answer the first inquiry (constitutional right of free speech). A more careful anti-SLAPP analysis would have already shown that the defendants’ speech constituted protected free speech by the time it reached the merits of the plaintiff’s claim, and would require an additional reason to establish that the plaintiff is unable to show a probability of success on his claims.

235. *Id.* at 905.

236. *Id.* at 905–06.

237. *Id.* at 905.

rebut the presumption that upholding his right of publicity would be unconstitutional,²³⁸ and held that “applying California’s right of publicity in this case would violate the First Amendment.”²³⁹ Finally, the court affirmed the dismissal of Sarver’s right of publicity claim.²⁴⁰

Lest one believe the Ninth Circuit found Sarver’s grievances more appropriately addressed on other grounds, the court likewise affirmed the dismissal of all of Sarver’s additional claims.²⁴¹ Highlighting non-celebrities’ need for the right of publicity, one of the claims dismissed was Sarver’s false light invasion of privacy claim.²⁴² Like Sarver, many non-celebrities may find that the right to privacy will not shield them against others’ appropriation of their identities—especially when these non-celebrities engage in public activities, or publicize their otherwise private activities.

IV. ANALYSIS OF SARVER’S FLAWED REASONING

In finding that Sarver’s right of publicity claim paled in comparison to the defendants’ freedom of expression, the Ninth Circuit entertained a couple of rationales that may justify upholding a person’s right of publicity. However, the court’s assessment of the available rationales’ applicability to Sarver’s claim seems incomplete.

The Ninth Circuit characterized California’s right of publicity law as a content-based law,²⁴³ and emphasized that, as such, it is “presumptively unconstitutional and may be justified only if . . . [it is] narrowly tailored to serve compelling state interests.”²⁴⁴ The court qualified this statement, however, by noting that both commercial speech and “speech which . . . appropriates the economic value of a performance or persona” are “unprotected by the First Amendment against a California right-of-publicity claim.”²⁴⁵ A synthesis of these two assertions reveals three scenarios in which a right of publicity claim may succeed: (1) if the speech in question is commercial; (2) if the speech in question appropriates the economic value of a performance or persona; or (3) if the state has a compelling interest in

238. *Id.* at 905–06.

239. *Id.* at 906.

240. *Id.*

241. *Id.* at 906–07.

242. *Id.* at 907. *See* Plaintiff’s Complaint and Demand for Jury Trial at 17 ¶ 75–77, *Sarver v. Hurt Locker LLC*, No. 2:10-CV-09034-JHN, 2011 WL 11574477 (C.D. Cal. Oct. 13, 2011).

243. *Sarver*, 813 F.3d at 903.

244. *Id.* (citing *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2226 (2015)).

245. *Id.* at 905.

upholding the right of publicity claim, even at the cost of restricting free speech. While *The Hurt Locker* definitely does not constitute commercial speech, the film may have appropriated the economic value of Sarver's identity, to the extent that it leveraged it to make a hugely profitable film.²⁴⁶ Alternatively, even if careful examination shows that the defendants did not appropriate the value of Sarver's identity, the state may have had a compelling interest in preventing the defendants' unjust enrichment and in protecting Sarver's right to autonomous definition. In sum, Sarver's right of publicity claim certainly did not fall under the first scenario, but it may have fallen under the second or the third, or both.

The court simultaneously held both that the defendants did not appropriate the economic value of Sarver's identity,²⁴⁷ and that the state had no compelling interest in upholding Sarver's right of publicity.²⁴⁸ The court did not clearly delineate the distinction between these two conclusions. In reaching this dual holding, the *Sarver* court compared Sarver to the plaintiffs in *Zacchini*, *Hilton*, and *In re NCAA*.²⁴⁹ The court used these plaintiffs as examples of worthy plaintiffs—ones whose protection against right of publicity violations would be justified by either the “fruits of labor” or the “incentive” policy rationales. Taking these successful plaintiffs and the corresponding cases in turn,²⁵⁰ it becomes apparent that the *Sarver* court misconstrued the precedent on which it relied. Specifically, the *Sarver* court wholly overlooked the “right to self-definition” rationale, and gave short shrift to the “unjust enrichment” rationale. Additionally, while the court did contemplate the “incentive” and “fruits of labor” rationales, it applied these to the case of a non-celebrity in a perfunctory manner.

246. Over one hundred million dollars in theaters box office and video sales according to *The Hurt Locker* (2009), THE NUMBERS, <http://www.the-numbers.com/movie/Hurt-Locker-The#tab=box-office> [<https://perma.cc/L8XJ-BSY5>] (last visited Jan. 22, 2017).

247. Or, alternatively, that his identity did not bear any economic value to begin with: “Sarver did not . . . invest time and money to build up economic value in a marketable performance or identity.” *Sarver*, 813 F.3d at 905.

248. *Id.* at 905–06.

249. *Id.*

250. This Note discusses only *Zacchini* and *Hilton* in detail. In *In re NCAA*, a football player brought California statutory and common law right of publicity claims against Electronic Arts (EA) for using his likeness in a video game. The Ninth Circuit upheld the Plaintiff's right of publicity claims. The *Sarver* court, evoking the “fruits of labor” rationale for the right of publicity, highlights the *In re NCAA* Plaintiff's “talent and years of hard work on the football field” as rendering him worthy of protection. *In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1281 (9th Cir. 2013).

A. ZACCHINI AND THE OVERLOOKED IMPORTANCE OF UNJUST ENRICHMENT

Emphasizing the importance of the “fruits of labor” and the “incentive” policy rationales, *Sarver* downplayed the relevance of the “unjust enrichment” rationale. In *Zacchini*, a “human cannonball” performer sued a broadcasting company for showing his performance on a television news program without his consent.²⁵¹ Earlier in the opinion, the *Sarver* court recognized that *Zacchini* referred to unjust enrichment as one reason to uphold the *Zacchini* Plaintiff’s right of publicity claim.²⁵² However, the *Sarver* court undermined this justification by linking it to the “incentive” rationale, rather than allowing it to stand independently, as a key rationale, as the *Zacchini* court did.²⁵³ Later in the opinion, when finding *Sarver* unworthy of protection, the *Sarver* court emphasized only the “fruits of labor”²⁵⁴ and “incentive”²⁵⁵ policy rationales, neglecting the “unjust enrichment” rationale altogether.

Where the broadcasting company in *Zacchini* profited from the plaintiff’s performance, the defendants in *Sarver* drew on *Sarver*’s experiences in making a successful Hollywood film, for which they were undoubtedly handsomely compensated. Suggesting that life stories have intrinsic value, it is common practice for film studios to acquire life story

251. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563–64 (1977).

252. *Sarver*, 813 F.3d at 903.

253. *Compare id.* at 903–04 (presenting the prevention of unjust enrichment as the means to achieve an end—providing an economic incentive: “According to the [*Zacchini*] Court, the state’s right of publicity law was aimed at protecting the proprietary interest of the individual in his act and prevent[ing] unjust enrichment by the theft of good will, *in order to* provide an economic incentive for [the individual] to make the investment required to produce a performance of interest to the public.”) (internal quotation marks omitted, emphasis added), *with Zacchini*, 433 U.S. at 576: (“The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will.”) (citing *Kalven*, *supra* note 126, at 331, internal quotation marks omitted), *and Zacchini*, 433 U.S. at 576 (noting, several lines below: “[T]he protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.”).

254. *Sarver*, 813 F.3d at 905 (alluding to the “unjust enrichment” rationale by using the word “stole,” but, ultimately, highlighting the “fruits of labor” rationale: “Neither the journalist who initially told *Sarver*’s story nor the movie that brought the story to life stole *Sarver*’s ‘entire act’ or otherwise exploited the economic value of any performance or persona he had worked to develop.”).

255. *Id.* (“*Sarver* did not make the investment required to produce a performance of interest to the public . . . Rather, *Sarver* is a private person who lived his life and worked his job. Indeed, while *Sarver*’s life and story may have proven to be of public interest, *Sarver* has expressly disavowed the notion that he sought to attract public attention to himself.”) (internal quotations omitted).

rights when making a film about a living person.²⁵⁶ Kalven's and *Zacchini's* articulation of the logic behind preventing unjust enrichment—"[n]o social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay"²⁵⁷—implies that film studios should continue to pay for their muses' life stories. A court more receptive of the "unjust enrichment" rationale might have concluded that Sarver's story and identity do have "market value," and that the defendants appropriated this value to the extent that they based the character of their film's protagonist on Sarver's life. Since *Sarver* found that speech that appropriates the economic value of a persona is not immune on First Amendment grounds to a California right of publicity claim,²⁵⁸ it is plausible that Sarver's claim should not have been dismissed at the anti-SLAPP stage.

The argument that the common practice of paying for life story rights suggests that life stories have economic value and must be purchased is, however, circular.²⁵⁹ It may be the case that many film studios are simply over cautious, and it is their peace of mind, rather than the life stories, that is valuable to them.²⁶⁰ Notwithstanding, even if the *Sarver* defendants did not appropriate the economic value of Sarver's identity, per se, they did profit from whatever inspiration Sarver may have sparked in them. In any case, a better reading of *Zacchini* would have noticed the parallels between the unjust enrichment of the broadcasting company in *Zacchini* and the profits that the defendants in *Sarver* enjoyed, and recognized that *Zacchini* stands for upholding the right of publicity to prevent unjust enrichment. By dismissing Sarver's case without grappling with the notion that the defendants benefitted from Sarver's identity and gave him nothing in return, the Ninth Circuit sent a message that non-celebrities' right of publicity

256. See Lisa A. Callif, *To Acquire or Not to Acquire Life Rights for a Movie*, LAW360, (June 22, 2015, 10:28 AM), <http://www.law360.com/articles/665781/to-acquire-or-not-to-acquire-life-rights-for-a-movie> [<https://perma.cc/6NHU-RPD5>] (last visited Jan. 22, 2017) (discussing the benefits of acquiring life rights even when not legally required).

257. Kalven, *supra* note 126, at 331; *Zacchini*, 433 U.S. at 576.

258. *Sarver*, 813 F.3d at 905.

259. See generally James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (discussing the phenomenon of "risk-averse licensing" and the resulting "doctrinal feedback" in various intellectual property law doctrines).

260. Considering that the typical errors and omissions (E&O) insurance application in the movie industry requires written releases for all names, faces, and likenesses, this cautiousness may be characterized as institutional. *Id.* at 893.

claims need not be upheld even where an important rationale for the right may be on their side.

B. THE ABSENT RATIONALE: THE RIGHT TO SELF-DEFINITION

Missing from the court's consideration was the state's potential interest in allowing all claimants the ability to control the way in which they are projected to society. In describing *The Hurt Locker*'s main character, Jimmy Fallon and Jeremy Renner (the film's lead actor) used the words "messed up" and "reckless," respectively.²⁶¹ Even though *The Hurt Locker* named its main character "James" rather than "Sarver," a reasonable person who both read Mark Boal's *The Man in the Bomb Suit* (which did use Sarver's name and provided details about Sarver's appearance and accent)²⁶² and watched the film would realize that the film, too, is about Sarver, and would form an opinion about Sarver. Given that the film portrays Sarver as a war-obsessed soldier who violates military rules, and as a detached father,²⁶³ many of the film's viewers likely grew to associate Sarver with such negative characteristics.

While Sarver's complaint listed most reputation-related harms under Sarver's "Defamation" claim,²⁶⁴ scholars such as McKenna would argue that a court should weigh Sarver's right to self-definition in deciding whether to uphold his right of publicity claim.²⁶⁵ Further, McKenna's contention that non-celebrities may seek to protect their anonymity, secrecy, and solitude²⁶⁶ is especially fitting in Sarver's case. Sarver, described by one of the defendants as "a loner by nature,"²⁶⁷ eschews public attention.²⁶⁸ Further, as a particularly apt EOD technician deployed in an enemy country, Sarver must maintain his anonymity to effectively and safely perform his duty.²⁶⁹

261. See Plaintiff's Complaint, *supra* note 242, at 18 ¶ 79c.

262. See Boal, *supra* note 205, at 72 (describing Sarver's height and "West Virginia twang").

263. Plaintiff's Complaint, *supra* note 242, at 18 ¶ 79a. See also *THE HURT LOCKER*, (Voltage Pictures 2008).

264. Plaintiff's Complaint, *supra* note 242, at 18–19 ¶¶ 78–81.

265. MCKENNA, *supra* note 141, at 294.

266. *Id.* at 286.

267. See Boal, *supra* note 205, at 150.

268. See *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016).

269. See Plaintiff's Complaint, *supra* note 242, at 21 ¶ 93b; Boal, *supra* note 205, at 73 (noting that, "reputedly," there is a "\$25,000 bounty" on the heads of EOD techs).

C. *HILTON AND THE DISTORTED VIEW OF INCENTIVES AND LABOR*

The *Sarver* court's comparison between Sarver and Paris Hilton²⁷⁰—the plaintiff in *Hilton v. Hallmark Cards*²⁷¹—proves illustrative of the court's superficial application of the “incentive” and “fruits of labor” rationales. As discussed *supra*, Hilton was allowed to proceed with her right of publicity claim against Hallmark after the court found Hallmark's card to lack the requisite transformative value that would entitle Hallmark to the transformative use defense as a matter of law.²⁷²

While the *Sarver* court neglected neither the “incentive” nor the “fruits of labor” policy rationales, a close reading of the opinion reveals that the court distorted these rationales such that they align with upholding only celebrities' right of publicity claims.²⁷³ A reflection on the types of behaviors that the state should incentivize and reward shows that the state may, in fact, have an interest in upholding the right of publicity of non-celebrities.

1. *The “Incentive” Rationale*

By finding that the “incentive” rationale is one that is applicable to Hilton's right of publicity claim—but inapplicable to Sarver's claim²⁷⁴—the *Sarver* opinion may lead to a distortion in the types of behaviors future courts deem worthy of incentivizing. As McCarthy posits, an important goal of the right of publicity is to make “[us] all better off” by motivating members of society to “undertake socially enriching activities which require entering the public scene.”²⁷⁵ The *Sarver* court distinguished between Hilton and Sarver by stressing that while Hilton was consciously motivated by the prospect of attaining a “marketable . . . identity,” Sarver shunned “public attention”;²⁷⁶ the public's fascination with Sarver was merely a collateral effect of his excellence in disarming improvised explosive devices. McCarthy would criticize *Sarver*'s emphasis on this distinction as one that “misperceives the real issue.”²⁷⁷ Arguably, the “real issue” is that

270. *Sarver*, 813 F.3d at 905–06.

271. *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010).

272. *Id.* at 911–12.

273. This interpretation is potentially in agreement with scholars such as Kwall. *See generally* Kwall, *supra* note 106 (arguing that the right of publicity should incentivize the various actions required of, particularly, celebrities).

274. *Sarver*, 813 F.3d at 905–06.

275. MCCARTHY, *supra* note 1, § 2:6.

276. *Sarver*, 813 F.3d at 905.

277. MCCARTHY, *supra* note 1, § 2:6.

where Sarver led his team to save, potentially, “hundreds of lives,”²⁷⁸ Hilton’s benefit to society consists of a modicum of entertainment.

Moreover, Sarver’s case bolsters McCarthy’s theory that, without the ability to control the use of one’s persona as secured by the right of publicity, the apprehension associated with attaining prominence may chill advantageous endeavors in any field.²⁷⁹ Sarver’s complaint pointed out that the defendants’ film exposed Sarver to “an increased risk of harm or even death during future deployments in a war zone” since it may have “further incit[ed] enemies to hunt down this high profile bomb squad hero who holds the record for most disarmed enemy IEDs.”²⁸⁰ The \$25,000 bounty that the Iraqi insurgency had “reputedly placed on the heads of EOD techs”²⁸¹ establishes the concreteness of this risk. Sarver’s ability to control his identity’s exposure may have thus been crucial for him to continue to serve the country and save more lives; the state undoubtedly had a compelling interest in incentivizing him to do so.

2. *The “Fruits of Labor” Rationale*

In much the same way that *Sarver* distorted the “incentive” rationale to suggest that the state may have a compelling interest in incentivizing the activities of celebrities, but not the activities of other productive citizens, *Sarver* tailored its “fruits of labor” analysis to justify rewarding the work that celebrities typically perform. *Sarver* compared Sarver to Hilton, and found that the work that Hilton performed—presumably, her attendance of glamorous events and participation in episodes of *The Simple Life*²⁸²—merited a reward: the upholding of her right of publicity claim.²⁸³

This comparison seems incomplete, however, since it failed to account for the work that Sarver performed—the same work that caused his life to be “of public interest.”²⁸⁴ Specifically, Sarver joined the army when he was nineteen,²⁸⁵ and, in the later years of his service, worked forty-eight hour

278. See Boal, *supra* note 205, at 72.

279. MCCARTHY, *supra* note 1, § 2:6. See also the discussion *supra*, at note 115 (suggesting that such apprehension may chill *talking* about one’s accomplishments).

280. See Plaintiff’s Complaint, *supra* note 242, at 21 ¶ 93b.

281. See Boal, *supra* note 205, at 73.

282. Between 2005 and 2007, Paris Hilton participated in a reality television show called *The Simple Life*. Paris Hilton, IMDB, <http://www.imdb.com/name/nm0385296/> [<https://perma.cc/MZ28-VTGE>] (last visited April 5, 2017).

283. *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016). See also *id.* at 904 (comparing Sarver to Keller, and stressing Keller’s “years of hard work on the football field” to illustrate the kind of labor that merits protection) (internal quotation omitted).

284. *Id.*

285. Boal, *supra* note 205, at 149.

shifts as an EOD in Baghdad, where he dismantled countless bombs and saved the lives of American soldiers and Iraqi civilians.²⁸⁶ While the bronze star he received for having led his team to “render[] safe the largest number of IEDs that were disarmed by any one team since operations began in Iraq”²⁸⁷ may suffice in terms of rewarding Sarver’s efforts, the state may have a compelling interest in rewarding Sarver’s accomplishments by upholding his right of publicity claim.

3. Summary

As the *Sarver* court distinguished *Sarver* from *Hilton*, its reading of *Hilton*’s reasoning proved tone-deaf. First, *Sarver* did not acknowledge the *Hilton* court’s characterization of Hilton as a “flamboyant heiress” who is “famous for being famous.”²⁸⁸ While not all heiresses are equally known, and Hilton has taken affirmative steps to become a household name, Hilton was born into the limelight. Therefore, though it may be plausible that the incentive that the right of publicity may offer motivated Hilton to continuously cultivate her persona, Hilton was arguably born with a “marketable identity” that no incentive scheme could have encouraged.

Additionally, *Sarver* ignored *Hilton*’s insinuations that Hilton is unaccustomed to working and emphasis on Hilton’s “privileged upbringing[.]”²⁸⁹ *Hilton*’s portrayal of Hilton is in tension with the *Sarver* court’s theory that Hilton, unlike Sarver, merited protection against a right of publicity violation since she “worked to develop” her persona, while Sarver did not.²⁹⁰

It seems perverse to express that the state has an interest in incentivizing and rewarding individuals who do nothing but engage in self-promoting, superficial activities, but that “[t]he state has no interest”²⁹¹ in doing the same for someone who has dedicated about twenty years of his life to the country.

D. IMPLICATIONS OF *SARVER*

As the District Court opinion demonstrated, there were good reasons to find that *The Hurt Locker* constitutes protected speech, and to dismiss Sarver’s right of publicity claim.²⁹² The reasoning that the Ninth Circuit

286. *Id.* at 149–52.

287. *Id.* at 152.

288. *Hilton v. Hallmark Cards*, 599 F.3d 894, 899 (9th Cir. 2010).

289. *Id.*

290. *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016).

291. *Id.*

292. *Sarver v. Hurt Locker LLC*, No. 2:10-CV-09034-JHN, 2011 WL 11574477, *7 (C.D. Cal. Oct. 13, 2011).

employed in *Sarver* is, however, dangerous for the future of non-celebrities' right of publicity. One can imagine right of publicity cases as sorting out into one of four quadrants, along two axes. One axis relates to the status of the plaintiffs, dividing the plaintiffs into celebrities and non-celebrities. The other axis relates to the nature of the defendants' identity-appropriating works, dividing the works into expressive speech and commercial speech. The *Sarver* court may provide precedent for future courts to dismiss a claim falling into the non-celebrity-expressive-speech quadrant.

Figure 1

Celebrity P against Commercial Speech (Minimal protections to speech)	Non-Celebrity P against Commercial Speech (Minimal protections to speech)
Celebrity P against Expressive Speech (The State may have a compelling interest in upholding P's claim)	Non-Celebrity P against Expressive Speech CAN NEVER WIN

This “carving-out” of a subset of right of publicity cases is in tension with Nimmer’s *The Right of Publicity*, which warned against drawing lines between celebrity and non-celebrity plaintiffs, and between commercial and expressive speech.²⁹³ Further, barring non-celebrities’ claims represents a break from some of the right’s important policy rationales—namely, the “unjust enrichment” and the “right to self-definition” rationales—and, potentially, a distortion of the “incentive” and “fruits of labor” rationales.

E. BEYOND *SARVER*—LOOKING TO THE FUTURE

In *Sarver*, the Ninth Circuit short-circuited the balancing-of-interests process that *Sarver*’s claim invited, and dismissed a non-celebrity’s right of publicity claim. Ultimately, the scales may have tipped in favor of the defendants’ freedom of expression even if the court had considered the full range of interests that support upholding a non-celebrity’s right of publicity. Nonetheless, examining the soundness of the Ninth Circuit’s “scale” is worthwhile because, should forthcoming courts reuse the *Sarver* “scale,” they may find that it tips also in favor of less meritorious expressive—or

293. Nimmer, *supra* note 11, at 216–17.

even commercial—works, jeopardizing the future of non-celebrities' right of publicity.

Over the past few decades—ever since celebrities began vigorously seeking the enforcement of their right of publicity—it has been difficult to imagine scenarios in which non-celebrities' identities would be used in works lacking significant transformative value. Owing to the value that a celebrity's perceived endorsement carries, advertisers often exploit celebrities' images for commercial purposes.²⁹⁴ Moreover, celebrities' identities have often been incorporated in works that, like the *Hilton* card, are somewhat, but not significantly, transformative.²⁹⁵ Conversely, non-celebrities' identities are commonly featured in highly transformative novels and films that seek to expose aspects of little-known, but interesting, people's lives.²⁹⁶ Hence, it is plausible that, typically, a court confronted with a non-celebrity's right of publicity claim would be justified in finding the claim to pale in comparison to the given defendant's freedom of expression. Such cases may have been characterized as “easy,” and probably did not call for extensive analyses of society's interests in upholding the right of publicity.

Due to recent cultural developments, however, we may be witnessing a shift in the type of works that exploit the identities of people, who, while not celebrities, are no longer anonymous. Seeing as eighty-one percent of Americans in the United States have a social media profile,²⁹⁷ non-celebrities are now more vulnerable than ever to having their identities misappropriated. As ordinary people share their photos and thoughts online, they become increasingly exposed to the public. Over night, ordinary people

294. Treece, *supra* note 99, at 644–46.

295. *Hilton v. Hallmark Cards*, 599 F.3d 894, 911 (9th Cir. 2010).

296. See e.g., MARGOT LEE SHETTERLY, *HIDDEN FIGURES: THE AMERICAN DREAM AND THE UNTOLD STORY OF THE BLACK WOMEN MATHEMATICIANS WHO HELPED WIN THE SPACE RACE* (2016) (recounting a true story, and serving as the basis for the 2016 film, *Hidden Figures*); MARTIN SIXSMITH, *THE LOST CHILD OF PHILOMENA LEE* (2009) (recounting the true story of a mother's fifty-year search for her forcibly adopted son, and serving as the basis for the 2013 film, *Philomena*).

297. *Percentage of U.S. population with a social media profile from 2008 to 2017*, STATISTA, <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-net-work-profile/> [<https://perma.cc/4R44-YSBG>] (last visited Mar. 19, 2017).

can become “Instagram famous”²⁹⁸ or YouTube sensations.²⁹⁹ Additionally, as the phenomenon of memes illustrates, virtually anyone’s photograph can be found online and transformed into a popular joke, seen by millions.³⁰⁰ A meme qualifies as an expressive work because its creator transforms an ordinary photograph into a form of social commentary by adding a whimsical caption. Although memes can be printed on merchandise and sold, they are generally created for non-commercial purposes. A given memes’ expressive value, however, is plausibly lesser than that of an Oscar-winning film. Courts should be prepared to carefully consider such non-celebrities’ right of publicity claims, especially should they arise in response to works that are less than transformative as a matter of law.

V. CONCLUSION

Sarver v. Chartier showcases a distorted right of publicity analysis that may have resulted from disregarding the right of publicity’s complicated evolution. It seems that the Ninth Circuit myopically looked only to the near past, and misconstrued the frequency of recent star-studded California right of publicity cases as signifying that celebrities alone merit protection when their identities are used without authorization. Failing to heed the warning of Nimmer’s *The Right of Publicity*,³⁰¹ the court drew bright lines to distinguish between celebrity and non-celebrity plaintiffs.

Moreover, the Ninth Circuit discounted some of the rationales justifying the right of publicity. Specifically, *Sarver* emphasized distorted versions of the “incentive” and the “fruits of labor” rationales, and neglected the “unjust enrichment” and the “right to self-definition” rationales. While the former pair of rationales—especially as presented by the court—aligns more

298. See e.g., Natasha Gillezeau, *Instagram Girl of the Week: Helen Owen*, GQ (Mar. 6, 2015), <http://www.gq.com.au/gq+girls/instagram+girl+of+the+week+helen+owen,36077> [<https://perma.cc/8A5X-FWHL>] (last visited Mar. 19, 2017) (interviewing Helen Owen, an “Instagram Famous” young woman who currently has 1.1 million followers).

299. See e.g., Chiara Milioulis, *Social Butterfly: Lauren Elizabeth*, SPLASH (Dec. 15, 2016), <http://www.chicagosplash.com/2016/12/15/social-butterfly-lauren-elizabeth> [<https://perma.cc/Y8CM-QHAV>] (last visited Mar. 19, 2017) (describing Lauren Elizabeth’s road to YouTube fame; she has nearly 1.3 million subscribers).

300. See e.g., *Who is ‘Scumbag Steve’? Internet teenage hate figure reveals infamous picture was taken by his mother (and he’s actually quite a nice guy)*, Daily Mail.com (Feb. 11, 2011, 07:59 AM), <http://www.dailymail.co.uk/news/article-1355793/Scumbag-Steve-Blake-Boston-speaks-Internet-hate-figure-reveals-famous-picture-taken-mother.html> [<https://perma.cc/2ENX-QFTW>] (last visited Mar. 19, 2017) (recounting the story of a young man whose MySpace picture became a viral meme).

301. Nimmer, *supra* note 11, at 217 (suggesting that courts should “rely upon the rule of damages” for all right of publicity cases, regardless of the celebrity status or lack thereof of the plaintiff as well as the nature of the defendant’s speech).

closely with protecting celebrities' personas than with protecting the identities of all persons, the latter pair is more inclusive and accounts for interests we all share.

The reasoning and holding of *Sarver* convey that, at least when the speech at issue is expressive, the state may have a compelling interest in upholding a celebrity's right of publicity claim, but a non-celebrity's claim is unable to rebut its presumptively unconstitutional nature, and merits no consideration. Such a conclusion may leave non-celebrities without recourse when expressive works leverage their identities without their consent. In today's social media era, virtually everyone has access to ordinary people's photographs, videos, résumés, and thoughts. This exposure renders non-celebrities more vulnerable than ever to having their identities appropriated without their consent. Hopefully, future courts granted with an opportunity to examine a non-celebrity's right of publicity claim will thoughtfully consider the full range of state interests promoted by upholding the right of publicity.

