MUCH ADO ABOUT EVOCATION: A CULTURAL ANALYSIS OF "WELL-KNOWNNESS" AND THE RIGHT OF PUBLICITY♦

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INTRODUCTION

White v. Samsung marked the historic moment when evocative aspects of the human persona beyond name and likeness were emphatically recognized by the Ninth Circuit to be actionable indicia of identity in a common law right of publicity claim.[1] It has been almost two decades and much academic commentary has been written criticizing the expansive reach of *White*.[2] This article offers an original perspective, suggesting that a better understanding of the contemporary celebrity phenomenon and its relation to consumption behavior can support the evocation principle, and that cultural studies can make a significant and pragmatic contribution to right of publicity laws.

How might cultural studies be useful to law? As outlined in a previous article, there are a number of key areas in right of publicity jurisprudence in which cultural studies may make a valuable contribution.[3] In Barthesian terms, the celebrity image is seen to be a "cultural narrative," or signifier, that is synonymous with the dominant culture.[4] Due to the meticulously constructed public personae of many celebrities, particularly movie stars and sport icons, the semiotic sign of these well-known individuals is usually decoded by the audience to represent a defined cluster of meanings. One often equates cultural studies with the theory and politics of ideology, identity and difference,[5] but as Lawrence Grossberg points out, new discursive opportunities present themselves when cultural studies moves "towards a model of articulation as 'transformative practice.'"[6] Much of cultural studies concentrates on how a particular phenomenon relates to matters of ideology, race, social class, and gender; they depart from the *text* (which can be seen as the law's main concern) to undertake a discursive analysis of the *context* to consider how power in society is distributed and contested through processes of production, circulation and consumption.[7] This "study of

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[1] White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395 (9th Cir. 1992).

[2] *See, e.g.*, Stacey L. Dogan, *An Exclusive Right to Evoke*, 44 B.C. L. REV. 291 (2003); Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 U. KAN. L REV. 329 (1997); David S. Welkowitz, *Catching Smoke, Nailing Jell-O to A Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. INTELL. PROP. L. 67 (1995); Fred Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223 (1994).

[3] *See* David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913 (2008).

[4] PATRICK FUERY & KELLI FUERY, VISUAL CULTURES AND CRITICAL THEORY 93, 101 (2003).

[5] CHRIS ROJEK, CULTURAL STUDIES 28 (2007). Rojek also observes that cultural studies are characterized by the 3 Ds of "deconstruction, demythologization and demystification." *Id.* at 27-28.

[6] Lawrence Grossberg, *Identity and Cultural Studies: Is That All There Is?*, *in* QUESTIONS OF CULTURAL IDENTITY 87, 88 (Stuart Hall & Paul Du Gay eds., 1996).

[7] *E.g.*, Douglas Kellner, *The Frankfurt School and British Cultural Studies: The Missed Articulation*, *in* RETHINKING THE FRANKFURT SCHOOL: ALTERNATIVE LEGACIES OF CULTURAL CRITIQUE 31 (Jeffrey T. Nealon & Caren Irr eds. 2002). Kellner points out that cultural studies "operates with a transdisciplinary conception" in understanding how texts are "articulating dis-

the quotidian world"[8] in cultural studies often employs a combination of ideological and empirical approaches, such as audience surveys, content analysis, narrative analysis, semiotics, and star studies.

This article argues that the judicial recognition of an expansive list of actionable indicia of identity in right of publicity cases is supported by a number of insights from cultural studies. Through an analysis of doctrine and an investigation of cultural and consumption practices, it will be shown that more courts should consider the adoption of an evocative identification standard when determining, as a threshold question, whether the identity of a plaintiff has been used by the defendant. Such an approach will properly give effect to how the identity of a well-known individual with a well-differentiated public personality is called to the minds of the contemporary audience.

Part I explains how the "use of identity" requirement in a right of publicity claim interacts with the other elements of the claim and highlights the judicial and academic concerns that have been raised over an expanding interpretation of identity. Part II examines how the courts have approached the issue of identification when determining an unauthorized commercial appropriation of a celebrity's identity, paying particular attention to evocative uses, which have attracted the greatest controversy. It proposes that courts should recognize that all indicia of identity are, in fact, evocative in nature, and that there is no real need to create different artificial categories of actionable characteristics. Part III supports this finding through its investigation of how the contemporary celebrity as defined by its "well-knownness" possesses specific attributes which enable its widespread public identification. It will critically evaluate the application of the proposed evocative identification standard to the different indicia of a celebrity's identity. Finally, Part IV concludes that insights from cultural studies on the creation of the contemporary celebrity, through widespread public recognition of its distinctive characteristics and its semiotic significance, support the expansive definition of the indicia of identity, and that courts could consider referring to such observations to augment judicial reasoning, particularly in cases that deal with evocative aspects of identity.

I. THE 'USE OF IDENTITY' REQUIREMENT IN A RIGHT OF PUBLICITY CLAIM

Each U.S. state that recognizes the right of publicity has a different definition of identity. This means that the celebrity plaintiff is likely to go "forum shopping" for the state which extends the most generous

courses in a given sociohistorical conjuncture" and one "should move from text to context, to the culture and society that constitutes the text and in which it should be read and interpreted." *Id.* at 43.

[8] Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship, in Cultural Analysis, in* CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM 1, 12-13 (Austin Sarat & Jonathan Simon eds., 2003).

right of publicity protection,[9] and "any national advertiser . . . must abide by the laws of the state or [C]ircuit with the most liberal views on publicity rights to avoid a lawsuit in that jurisdiction."[10]

To establish a prima facie case, a celebrity plaintiff must usually prove that his or her identity has been used, that is, a "more than de minimis number of ordinary viewers of [the] defendant's use identify the plaintiff."[11] This is a question of fact for the jury.[12] As the Ninth Circuit has pointed out, "[i]dentifiability … is a central element of a right of publicity claim."[13] There are a number of acceptable methods of proving identifiability of the plaintiff from the defendant's use. They include: (i) a simple courtroom "on its face" comparison;[14] (ii) evidence of a number of elements in the context of the defendant's use which cumulatively point to the plaintiff;[15] (iii) evidence of unsolicited identification by reasonable persons who made comments to the plaintiff about the similarity;[16] (iv) survey evidence of the relevant universe of purchasers of the defendant's product or service showing that these purchasers are able to identify the plaintiff from the defendant's use;[17] and (v) direct or circumstantial evidence of the defendant's intent to trade upon the identity of the plaintiff, from which identifiability can be presumed.[18]

The classic definition of identity in a common law claim is usually "name and likeness" with a number of states recognizing "persona" as a

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[9] Angela D. Cook, *Should Right of Publicity Protection be Extended to Actors in the Characters in which They Portray*, 9 DEPAUL-LCA J. ART & ENT. L. 309, 342 (1999).

[10] Michael J. Albano, *Nothing to "Cheer" About: A Call for Reform of the Right of Publicity in Audiovisual Characters*, 90 GEO. L.J. 253, 258 (2001). *See also* J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 132 (1995); Peter K. Yu, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355, 358-59 (1998).

[11] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 3:17 (2d ed. 2000). *See also* Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 595 (N.D. Tex. 1999); MCCARTHY, *supra* §§ 3:18-3:22, 4:47, 4:56-4:57, 4:60. *See generally* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978).

[12] Appeal courts often reverse summary judgment for the defendant, remanding the issue of identifiability of the celebrity from the defendant's use for trial. *See, e.g.*, Wendt v. Host Int'l, Inc. (*Wendt I*), 125 F.3d 806 (9th Cir. 1997); White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395 (9th Cir. 1992); *Motschenbacher*, 498 F.2d 821; *see also* Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979) (reversing trial court's grant of defendants' motion to dismiss for failure to prove the existence of a cause of action upon which relief can be granted).

[13] Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1102 (9th Cir. 1992). *See also White I*, 971 F.2d at 1398-99.

[14] MCCARTHY, *supra* note 11, § 3.22.

[15] *E.g.*, *White I*, 971 F.2d 1395; *Ali*, 447 F. Supp. 723; Negri v. Schering Corp., 333 F. Supp. 101 (S.D.N.Y. 1971); Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661 (App. Div. 1977).

[16] *E.g.*, *Waits*, 978 F.2d 1093; Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[17] *E.g.*, Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998); Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).

[18] This is particularly relevant in soundalike and lookalike cases when the advertising agency proceeds with an imitation after the celebrity has declined to be featured. *E.g.*, *Waits*, 978 F.2d 1093; *Midler*, 849 F.2d 460; Onassis v. Christian Dior-N.Y, Inc., 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095 (App. Div. 1985).

broader concept that encompasses all aspects of identity,[19] while the definition in a statutory cause of action tends to enumerate specific actionable aspects of identity, like "name, voice, signature, photograph or likeness."[20] It is important to appreciate that an expansive interpretation of what constitutes actionable aspects of identity does not equate to liability for the defendant. There are two further elements that must be satisfied. Theoretically, once the plaintiff is identified from the defendant's use, one should proceed to consider if the commercial value of that identity has been appropriated by the defendant.[21] In the final and most significant hurdle, the right of publicity, whether common law or statutory in nature, must be weighed against the preeminent position of the freedoms of speech and press guaranteed in the First Amendment. In articulating the First Amendment defense, the conflict between free speech values and the plaintiff's proprietary right of publicity presents a significant challenge for courts attempting to formulate different balancing tests to resolve this issue.[22]

As the analysis in Part II will demonstrate, state jurisdictions like California and New York,[23] which are home to significant numbers of

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[19] *E.g.*, Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989); Eastwood v. Super. Ct. of L.A. County, 198 Cal. Rptr. 342 (Ct. App. 1983); Estate of Elvis Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); State ex rel. Elvis Presley Int'l Mem. Found. v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

[20] *E.g.*, CAL. CIVIL CODE § 3344(a) (2010); FLA. STAT. § 540.08 (2007); MASS. GEN. LAWS ANN. ch. 214, § 3A (2005); N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 2009); OHIO REV. CODE ANN. § 2741.01 (West 2009); TENN. CODE ANN. §§ 47-25-1101 to 1108 (2005). Illinois extends protection to all aspects of the human persona. Illinois Right of Publicity Act, 765 ILL. COMP. STAT. ANN. 1075/5 (1999).

[21] Although Restatement (Third) of Unfair Competition § 46 and *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), have defined an unauthorized appropriation of the *commercial value* of a person's identity, courts have not been consistent in considering this element of the claim. The proof of a "direct connection" is required under certain statutory claims. *E.g.*, CAL. CIVIL CODE § 3344(e).

[22] The First Amendment defense in a right of publicity claim, as well as the statutory exemptions of particular uses which incorporate free speech considerations, is beyond the scope of this article. A celebrity plaintiff will typically argue that an advertisement containing the unauthorized use of her identity amounts to "commercial appropriation." However, the counter-argument by the defendant would be to claim that there were artistic elements in the advertisement, or that the expressive use of the celebrity's identity amounted to political speech or social commentary, and was hence entitled to First Amendment protection despite its commercial purpose. *See generally* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185 (9th Cir. 2001); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 969-76 (10th Cir. 1996); White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395, 1407 (9th Cir. 1992); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802-11 (Cal. 2001); MCCARTHY, *supra* note 11, § 8:97.

[23] *See* Paul Cirino, *Advertisers, Celebrities, and Publicity Rights in New York and California*, 39 N.Y.L. SCH. L. REV. 763, 764-78 (1994). In New York, the celebrity can only make a claim under sections 50-51 of the New York Civil Rights Law (NYCRL), but the courts have given the statutory definition of "name, portrait or picture" a broad interpretation to include lookalikes and evocative aspects of identity that may constitute a visual depiction or representation of the plaintiff. *E.g.*, Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Onassis v. Christian Dior-N.Y, Inc., 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095 (App. Div. 1985); Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661 (App. Div. 1977). New York does not recognize an independent common law right of publicity claim but the NYCRL "not only encompasses a right to privacy which minimizes the intrusion or publication of damaging material to a person by use of their name or picture, *but also encompasses a right to publicity*, which protects the proprietary nature of the person's public personality." DeClemente v. Columbia Pictures In-

celebrities in the film and entertainment industries where numerous high profile celebrity claims have been decided, as well as the Sixth and Ninth Circuits,[24] have extended the actionable indicia of identity to any distinctive aspect of a celebrity's public personality. The Restatement (Third) of Unfair Competition has also chosen the California approach as its model code in allowing claims for the unauthorized use of "name, likeness, or other indicia of identity."[25] It has been said that the right of publicity is no longer limited to "the name or likeness of an individual, but now extends to a person's nickname, signature, physical pose, characterization, singing style, vocal characteristics, body parts, frequently used phrases, car, performance style, mannerisms, and gestures, provided that these are distinctive and publicly identified with the person claiming the right." [26]

The judicial and academic criticisms of this expanding interpretation of identity, especially in a common law right of publicity claim, seem to center on: (i) creating confusing precedent that will result in exposing advertisers and other performers to lawsuits by celebrities;[27] (ii) overprotecting negligible aspects of persona or "ephemeral trends,"[28] and (iii) according celebrities an overarching property right that chills speech[29] and impoverishes the cultural domain.[30]

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dus., Inc., 860 F. Supp. 30, 52 (E.D.N.Y. 1994). For an analysis of commercial appropriation from the perspective of cultural studies, see David Tan, *Affective Transfer and the Appropriation of Commercial Value: A Cultural Analysis of the Right of Publicity*, 9 VA. SPORTS & ENT. L.J 272 (2010).

[24] *E.g.*, Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); *White I*, 971 F.2d 1395; Wendt v. Host Int'l, Inc. (*Wendt I*), 125 F.3d 806 (9th Cir. 1997).

[25] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

[26] Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 367 (1992).

[27] *E.g.*, *White I*, 971 F.2d at 1405 (Alarcon, J., dissenting); Weiler, *supra* note 2, at 271 ("[A]dvertisers should be able to remind the public of a celebrity, so long as the advertiser does not link the celebrity to the product in order to make the product more desirable."); Andrew W. Eaton, *We're Not Gonna Take It!: Limiting the Right of Publicity's Concept of Group Identity for the Good of Intellectual Property, the Music Industry, and the People*, 14 J. INTELL. PROP. L. 173, 203 (2006) ("The vision of protectible identity championed in *White*, however, unquestionably stretched the right of publicity beyond the scope of reason.").

[28] Christopher Pesce, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. REV. 782, 803 (1990). *See also* White v. Samsung Elec. Am. (*White II*), 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, J., dissenting); Welkowitz, *supra* note 2, at 84 ("[T]he Ninth Circuit's failure to examine carefully the purpose for which the celebrity was invoked inevitably led to an overbroad concept of the property right of celebrity.").

[29] *E.g.*, ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 931-38 (6th Cir. 2003); *White II*, 989 F.2d at 1519-21 (Kozinski, J., dissenting); Coombe, *supra* note 26, at 394 ("It is through creative cultural practices of articulation that the social world is given meaning, and [these practices are] central to democratic politics."); Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 156 (1996) (noting that important rhetorical resources will be taken out of the public domain and this cannot be squared with First Amendment values).

[30] *E.g.*, *White II*, 989 F.2d at 1516-17 (Kozinski, J., dissenting); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 at 839, 842-45 (6th Cir. 1983) (Kennedy, J., dissenting); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 142 (1993) ("[T]he law has moved more and more of our culture's basic semiotic and symbolic resources out of the public domain and into private hands."); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69

Unfortunately, courts do not always adhere to a formulaic step-by-step approach when evaluating publicity claims. The courts usually equate identification with misappropriation. The presumption is that the defendant obtained a commercial advantage if the plaintiff succeeded in proving that his or her identity was used by the defendant in a commercial context – combining the first and second elements of the claim.[31] The courts may also look at the totality of the situation and conclude that since the alleged unauthorized use was in an advertisement, it is commercial speech and its intended effect must be to evoke the celebrity in the minds of the audience in order to free-ride on a celebrity's fame – effectively combining all three elements of the claim in one analysis.[32]

In short, judges have not been consistent in addressing each element of a right of publicity claim separately. It appears from cases like *White v. Samsung*,[33] *Wendt v. Host International*,[34] and *Lombardo v. Doyle, Dane & Bernbach*,[35] that the courts are open to finding liability as long as the celebrity in question can be identified from the unauthorized commercial use. The typical right of publicity cases are traditionally divided into two categories: (i) appropriation of name and likeness (which includes any literal depiction like a portrait or photograph); and (ii) evocation that reminds the audience of a particular celebrity (which includes voice, characterization and objects closely associated with the celebrity). In the appropriation of name and likeness cases, the identifiability element of the claim is usually not a contentious issue, and the courts tend to focus on First Amendment arguments. The evocative cases are more complex, and the courts often combine the "use of identity" and "commercial appropriation of the value of identity" as one analysis which may result in a decision like *White*, which has been the subject of much criticism.[36] However, Part II, in its doctrinal analysis, will attempt to disaggregate the use of indicia of identity from the commercial appropriation element.

II. IDENTIFIABILITY: NAME, LIKENESS AND OTHER INDICIA OF IDENTITY

Since the landmark recognition of publicity rights in *Haelan Lab.*

TEX. L. REV. 1853, 1855 (1991) ("[I]ntellectual property laws stifle dialogic practices – preventing us from using the most powerful, prevalent, and accessible cultural forms to express identity, community and difference.").

[31] *E.g.*, Eastwood v. Super. Ct. of L.A. County, 198 Cal. Rptr. 342, 348-49 (Ct. App. 1983); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[32] *White I*, 971 F.2d at 1401.

[33] *Id.* The petition for en banc rehearing was denied. *White II*, 989 F.2d 1512 (9th Cir. 1993), *cert. denied*, 508 U.S. 951 (1993).

[34] Wendt v. Host Int'l, Inc. (*Wendt II*), 197 F.3d 1284 (9th Cir. 1999).

[35] Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661 (App. Div. 1977).

[36] *E.g.*, ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 932 (6th Cir. 2003) (majority opinion rejecting the application of *White*); Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 625-26 (6th Cir. 2000) (unanimous opinion rejecting the application of *White*); *Wendt II*, 197 F.3d at 1285-88 (Kozinski, J., dissenting); Langvardt, *supra* note 2; Weiler, *supra* note 2; Welkowitz, *supra* note 2.

Inc. v Topps Chewing Gum Inc.,[37] courts have had difficulty determining "the extent to which a use must evoke or appropriate a celebrity's identity before violating his or her right of publicity."[38] Commentators have bemoaned that "[d]efining the contours of celebrity identity is an uncommonly puzzling legal undertaking."[39] Unlike its statutory counterpart, which often delimits the indicia of identity, a common law claim tends to embrace a broader conception of indicia of identity encompassing many aspects of an individual's persona. In the absence of a federal standard, it is not surprising that most state jurisdictions which recognize a common law right of publicity continue to struggle for a clear and precise definition of this first element.[40]

Of all the U.S. states, California, boasting a disproportionately high concentration of celebrities in the film, television, and entertainment industries, has the broadest definition of "identity" making it an attractive forum for a celebrity to commence a claim. Faced with a stream of celebrity claims for right of publicity infringements over the last thirty years, the California State Supreme Courts and the Ninth Circuit[41] have led the expansion of the definitional parameters of the indicia of identity, and other state and circuit courts have frequently looked to them for guidance.[42]

Courts have used the term "persona" as an all-encompassing label for all the elements which identify a person.[43] According to McCarthy,

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[37] Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953). In *Haelan Lab*, the Second Circuit first recognized an infringement of the right of publicity as an independent cause of action, departing from the cases from the early twentieth century, where the courts protected individuals from unauthorized commercial uses of name and likeness by enforcing a right of privacy. *Id.*

[38] Steven C. Clay, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 487 (1994).

[39] Eaton, *supra* note 27 at 204.

[40] *See* Marci Hamilton et al., *Right of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209 (1998); Kevin M. Fisher, *Which Path to Follow: A Comparative Perspective on the Right of Publicity*, 16 CONN. J. INT'L L. 95, 101-04 (2000).

[41] According to Circuit Judge Kozinski, "we *are* the Court of Appeals for the Hollywood circuit." White v. Samsung Elec. Am. (*White II*), 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting). For cases applying California law, see, e.g., Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001); Wendt v. Host Int'l, Inc. (*Wendt I*), 125 F.3d 806 (9th Cir. 1997); White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395, 1407 (9th Cir. 1992); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[42] The Ninth Circuit is regarded as "a sort of torchbearer." Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford – A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 262 (2007). *See also* Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619 (6th Cir. 2000) (Kentucky statutory right of publicity); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (Michigan common law right of publicity); Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003); Bosley v. Wildwett.com, 310 F. Supp. 2d 914 (N.D. Ohio 2004). Illinois and Indiana also have sweeping right of publicity statutes and the courts there tend to consider the decisions of the California courts and Ninth Circuit when interpreting the statutes. *See* 765 ILL. COMP. STAT. 1075/5 (1999); IND. CODE § 32-36-1-7 (2002).

[43] *E.g.*, Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000); Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 289 (2d Cir. 1981); Ali v. Playgirl, Inc., 447 F. Supp 723, 728 (S.D.N.Y. 1978); Lugosi v. Universal Pictures, 603 P.2d 425, 438 (Cal. 1979) (Bird, C.J., dissenting); Onassis v.

'persona' "was apparently adopted as a convenient label when [courts] realized that the traditional phrase 'name and likeness' was inadequate to describe the many aspects of a person that can identify him or her."[44] Twenty-seven years ago, Judge Sofaer held that the right of publicity "protects the persona – the public image that makes people want to identify with the object person, and thereby imbues his name or likeness with commercial value marketable to those that seek such identification."[45] Today, courts in different jurisdictions usually agree that only individuals who are recognizable by the public from the alleged misappropriation may have a claim for an unauthorized use of identity; it is not sufficient if only the plaintiff knows that his or her persona has been used without consent.[46]

While the three sections below analyze the different attributes of persona that cover the traditional categories of name and likeness and a more general category titled "evocative aspects of identity," it should be emphasized that in a significant number of cases, the courts have held that it does not matter whether the celebrity plaintiff was identifiable by any one of these indicia or several in combination; the ultimate issue is identifiability by the audience from the defendant's use.[47]

A. *Name*

The use of "name" has been widely accepted to include a plaintiff's real name,[48] nickname,[49] stage name,[50] or fictitious name.[51] But the plaintiff's name has to be used as "a symbol of. . . identity"[52] to obtain a commercial advantage "and not … as a mere name."[53] In *Doe v. TCI Cablevision*, it was held that although the fictional character in a comic book (the subject of the alleged unauthorized appropriation) and the real Tony Twist (a well-known former professional hockey player) bore "no physical resemblance to each other … aside from the common

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Christian Dior-N.Y., Inc., 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095 (App. Div. 1985).

[44] MCCARTHY, *supra* note 11, § 4:45.

[45] Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983).

[46] *E.g.*, Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996); Cheatham v. Paisano Publ'ns, 891 F. Supp. 381 (W.D. Ky. 1995).

[47] *See e.g.*, Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 414 (9th Cir. 1996); White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395, 1398 (9th Cir. 1992); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983).

[48] *E.g.*, Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003); *Abdul-Jabbar*, 85 F.3d 407; Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).

[49] *E.g.*, Doe v. TCI Cablevision, 110 S.W.3d 363, 370 (Mo. 2003) (en banc); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 137 (Wis. 1979).

[50] *E.g.*, Cher v. Forum Int'l Ltd., 692 F.2d 634 (9th Cir. 1982); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454 (Cal. 1979) (en banc).

[51] *E.g.*, William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 404 (1960).

[52] *Doe*, 110 S.W.3d at 369. *See also* Nemani v. St. Louis Univ., 33 S.W.3d 184, 185 (Mo. 2000).

[53] *Nemani*, 33 S.W.3d 184 at 185.

nickname,"[54] nevertheless the name was understood by the public as referring to the plaintiff.[55] The courts have made it clear that mere name-sameness of a fictional character is not sufficient identifiability to satisfy a right of publicity claim;[56] the courts will consider "plus factors"[57] like whether the defendant intentionally named a character after the plaintiff and whether the target audience for the defendant's product was the same as the plaintiff's audience.

The touchstone for identification appears to be that the "name" must identify the plaintiff *as the celebrity* that the consuming public is familiar with. Thus, the use of Johnny Carson's real name, "John William Carson," which does not identify Johnny Carson the celebrity, would not satisfy the identifiability requirement in a right of publicity claim.[58] However, when Lew Alcindor converted to Islam and adopted the Muslim name Kareem Abdul-Jabbar, the Ninth Circuit held that the unauthorized use of the plaintiff's little-known birth name "Lew Alcindor" together with other factual information regarding his basketball achievements in an advertisement nevertheless may sufficiently enable the audience to identify Kareem Abdul-Jabbar the celebrity.[59]

Generally, the use of name in a publicity claim is not a controversial area.[60] The question reduces to whether purchasers of the defendant's product would identify the plaintiff celebrity from the defendant's use of name. The issue usually arises as to whether an unauthorized use of name was for a purely commercial purpose or whether there was some expressive element protected by the First Amendment, such as the use of civil rights activist Rosa Parks' name as the title of a song.[61]

B. *Likeness*

Like the use of "name," the plaintiff must be capable of being clearly identified by the audience from a visual image. "Likeness" is a

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[54] *TCI Cablevision*, 110 S.W.3d at 366.
[55] The plaintiff later recovered a fifteen million dollar jury verdict in the case. Doe v. McFarlane, 207 S.W.3d 52 (Mo. Ct. App. 2006).
[56] *See e.g.*, Newton v. Thomason, 22 F.3d 1455, 1461 (9th Cir. 1994); DeClemente v. Columbia Pictures Indus., Inc., 860 F. Supp. 30 (E.D.N.Y. 1994); Hooker v. Columbia Pictures Indus., Inc., 551 F. Supp. 1060, 1062-63 (N.D. Ill. 1982).
[57] MCCARTHY, *supra* note 11, § 4:48.
[58] Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983).
[59] Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 416 (9th Cir. 1996).
[60] This position tends to be valid for common law claims. A narrower construction of "name" appears to be adopted for some statutory claims, particularly under New York Civil Rights Law section 50. *See, e.g.*, Hampton v. Guare, 600 N.Y.S.2d 57, 58 (App. Div. 1993); Geisel v. Poynter Prod. Inc., 295 F. Supp. 331, 335 (S.D.N.Y. 1968); MCCARTHY, *supra* note 11, § 4:57.
[61] *Compare* Parks v. LaFace Records, 329 F.3d 437, 442 (6th Cir. 2003) (reversing grant of summary judgment in favor of band OutKast and allowing Rosa Parks to pursue a claim for use of her name in the title of a song) *with* Rogers v. Grimaldi, 875 F.2d 994, 999-1000 (2d Cir. 1989) (citing, as an example, the song title "Bette Davis Eyes" given in the majority opinion of another case where it was thought to be permissible artistic expression).

generic label used, particularly in a common law publicity claim, to encompass two- and three-dimensional visual representations that portray the plaintiff's persona through his or her physical appearance.[62] Examples of "likeness" include pictures, portraits, images, and photographs in a variety of media like paintings, drawings, and sculptures, where the facial characteristics of the plaintiff are recognizable.[63]

In a statutory claim, the relevant statute will enumerate the actionable attributes, and "likeness" is usually, but not always, listed with "photograph," "image," or "portrait," as a visual aspect of identity. Where the statute does not comprehensively list the different types of visual representations, the courts have held that "likeness" could be interpreted to include any recognizable image of a person, as long as the person is "readily identifiable . . . with the naked eye."[64] In *Newcombe v. Adolf Coors Co.*, the drawing of a baseball player depicting him in a distinctive windup stance was held to be readily identifiable as the plaintiff by the public.[65] In *Ali v. Playgirl*, the court held that a drawing of a nude black man in a boxing ring accompanied by the words "The Greatest" was a "portrait or picture" of Muhammad Ali.[66] In *Allen v.. Nat'l Video*[67] and *Onassis v. Christian Dior-N.Y.*,[68] both Woody Allen and Jacqueline Kennedy Onassis succeeded in obtaining injunctions against the use of pictures featuring their lookalikes in advertisements. Even where the likeness has been altered, for example in a video game or comic book character[69] or in a digitally manipulated photograph,[70] it may be sufficient to identify the celebrity in question.[71]

In summary, when more than a de minimis number of people in fact identify the plaintiff from the use of her likeness, it is difficult for a court to hold that identifiability has not been proven for the purposes of

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[62] *See also* Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 788 (1997) ("[T]he features of his or her face express . . . a unique meaning. This meaning is the plaintiff's personality.").

[63] *See e.g.*, Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (drawing that identified Muhammad Ali); Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973) (photograph of Cary Grant); Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982) (three-dimensional bust of Martin Luther King, Jr.).

[64] Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998); CAL. CIV. CODE § 3344(b)(1). *See also Ali*, 447 F. Supp. 723; Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975); Chaplin v. Amador, 269 P.544 (Cal. Ct. App. 1928).

[65] *Newcombe*, 157 F.3d at 692.

[66] *Ali*, 447 F. Supp. at 726-27.

[67] Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985).

[68] Onassis v. Christian Dior-N.Y. Inc., 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095 (App. Div. 1985).

[69] *E.g.*, Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607 (Ct. App. 2006); Winter v. DC Comics, 69 P.3d 473 (Cal. 2003); Doe v. TCI Cablevision, 110 S.W.3d 363, 370 (Mo. 2003).

[70] *E.g.*, Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001); Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973).

[71] However, the celebrity may still fail in his or her right of publicity claim on First Amendment grounds because a particular use has significant transformative elements. *E.g.*, *Kirby*, 50 Cal. Rptr. 3d 607; *Winter*, 69 P.3d 473; *Hoffman*, 255 F.3d 1180. *Contra TCI Cablevision*, 110 S.W.3d at 369.

establishing a prima facie case.

C. *Evocative Aspects of Identity*

The word "evoke" means "to call forth," "to conjure up," or "to bring to mind or recollection."[72] Presently, all the other indicia of identity outside of "name" and "likeness" which are recognized by the courts fall into three broad categories, united by their ability to, either singularly or in various combinations, "evoke" the celebrity in the minds of the audience in a manner that readily identifies the plaintiff. These three categories are: (i) a distinctive voice that evokes the celebrity (as represented by the typical soundalike imitation cases); (ii) a role or character that is evocative of the plaintiff (as represented by the typical use of a film or television character popularized by the plaintiff); and (iii) other indicia that evoke the celebrity (as seen in the more difficult cases where the defendant may have used a combination of objects, dress, makeup, performing style, music, set design, etc.).

The circuit decisions for the state of California have expanded the meaning of identity in a common law publicity claim beyond "name and likeness" to include virtually any attribute associated with a celebrity individual.[73] Even where the use of a robot that was identified with Vanna White probably did not constitute a likeness of the celebrity, the Ninth Circuit held that it may nonetheless be an appropriation of her identity under a common law claim and remanded the case for trial.[74] In particular, the court commented that:

> Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. *The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice*.[75]

But the definitions of identity in common law and statutory actions usually do not indicate "to whom or to what degree the plaintiff must be identifiable from the alleged likeness."[76] As a general rule, the courts, especially the Ninth Circuit, tend to consider the defendant's use in its

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[72] WEBSTER'S NEW ENCYCLOPEDIC DICTIONARY 632 (2002); OXFORD DICTIONARY & THESAURUS 352 (2d ed. 2007).
[73] *E.g.*, White v. Samsung Elec. Am., Inc. (*White I*), 971 F.2d 1395 (9th Cir. 1992); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).
[74] *White I*, 971 F.2d at 1399.
[75] *Id.* (emphasis added).
[76] Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998); *cf.* McCarthy's proposed standard of a more than de minimis number of persons, MCCARTHY, *supra* note 11, §§ 3:7, 3:17-3:22.

entirety when deciding the issue of identifiability.[77] Although the New York Civil Rights Law section 50 only allows recovery for unauthorized uses of "name, portrait or picture," dicta from the New York Supreme Court indicated that "[t]here are many aspects of identity. A person may be known not only by objective indicia – name, face, and social security number, but by other characteristics as well – voice, movement, style, coiffure, typical phrases, as well as by his or her history and accomplishments."[78] Similarly, the Third Circuit, in interpreting New Jersey law, extends a generous reading of identity to any "defining trait that becomes associated with a person when he [or she] gains notoriety or fame."[79]

In summary, some courts are prepared to find that the identity requirement is satisfied as long as a clear reference to a celebrity has been evoked by an advertisement – that is, where the celebrity in question is "readily identifiable" by the audience – from which there was a commercial advantage to be gained by the defendant.[80] Thus the identity requirement so broadly construed can include a distinctive and widely recognized voice, an iconic character, and a distinctive costume, makeup, or setting – any characteristic that is clearly evocative of a particular celebrity in the minds of the audience.

1. Voice

A voice can conjure up visions of a celebrity in the audience's mind as effectively as a name or a likeness. According to the Ninth Circuit, "[a] voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested."[81] It appears that a distinctive voice possesses characteristics like a "readily identifiable accent, range, quality, or pitch which would distinguish it to the ordinary listener from many others or identify it with any particular person."[82] But the plaintiff's voice must be considered apart from any particular song which he or she has recorded.[83]

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[77] "Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict." *White I*, 971 F.2d at 1399. *See also supra* notes 14-18; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

[78] Onassis v. Christian Dior-N.Y., Inc., 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984). *See also* Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661 (App. Div. 2d Dep't 1977).

[79] McFarland v. Miller, 14 F.3d 912, 923 (3d Cir. 1994).

[80] *E.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992); White v. Samsung Elec. Am., Inc. (*White I*), 971 F.2d 1395 (9th Cir. 1992).

[81] *Midler*, 849 F.2d at 463 (citing DON IHDE, LISTENING AND VOICE 77 (1976)).

[82] Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 716 n.12 (9th Cir. 1970) (internal examples omitted). *See also* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1101 (9th Cir. 1992) ("A voice is distinctive if it is distinguishable from the voices of other singers . . .[sic] if it has particular qualities or characteristics that identify it with a particular singer.").

[83] *Sinatra*, 435 F.2d at 716; MCCARTHY, *supra* note 11, § 4:76. *See also* Christopher Man, *The Scope of Intellectual Property's Protection of Stylistic Rights*, 47 WASH. U. J. URB. & CONTEMP. L. 213 (1995).

Midler v. Ford Motor Company represents a typical imitation case where the defendant uses a soundalike of a celebrity singer in an advertisement, usually as a result of the particular celebrity refusing to appear in the advertisement or to endorse the product.[84] Such cases present a strong argument for the enforcement of the right of publicity as the defendant is usually shown to have obtained a commercial advantage through capturing the associative value of a celebrity's identity without the payment of an appropriate fee to the celebrity. The *Midler* decision, affirmed in the subsequent soundalike case of *Waits v. Frito-Lay Inc.*,[85] does not stand for the proposition that every imitation of the voice of a celebrity singer to advertise a product is actionable. The law requires the celebrity to have a "distinctive" voice that is "widely known" as an identifying characteristic.[86]

2. Role or Characterization

Celebrity actors can have a public persona that is so embodied in a distinctive role or character that this fictitious persona may become inseparable from the celebrity individual. A character is a composite of his or her "name, physical appearance, attributes, mannerisms, speech and expression, habits, attire, setting, and locale."[87] The courts have held that "an actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character."[88] The cases have generally established that "although exploitation of a fictional character may, in some circumstances, be a means of evoking the actor's identity . . . the focus of any right of publicity analysis must always be on *the actor's own persona* and not the character's."[89] Recently, the courts have established a high threshold in what is commonly called the "inextricably identified" test[90] for satisfying the identifiability requirement with respect to evocation of the plaintiff by a fictional character: the plaintiff must prove that the "character [is] so as-

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[84] *See Midler*, 849 F.2d at 461; *see also Waits*, 978 F.2d 1093; *Sinatra*, 435 F.2d at 716. A comprehensive analysis of imitation cases may be found in Pesce, *supra* note 28.

[85] Four years later, the Ninth Circuit applied *Midler* to similar facts concerning Tom Waits' claim against Frito-Lay for the use of a soundalike in an advertisement after he had refused to sing in it. Waits received almost two-and-a-half million dollars in damages. *See Waits*, 978 F.2d 1093.

[86] *Midler*, 849 F.2d at 463; *Waits*, 978 F.2d at 1101-02. The requirement of a distinctive voice is not without its criticisms. *E.g.*, Keith E. Lurie, *Waits v. Frito-Lay: The Song Remains the Same*, 13 CARDOZO ARTS & ENT. L.J. 187, 190 (1994); Pesce, *supra* note 28, at 823.

[87] Cook, *supra* note 9 at 349 (quoting Dean Niro, *Protecting Characters through Copyright Law: Paving a New Road Upon Which Literary, Graphic and Motion Picture Characters Can All Travel*, 41 DEPAUL L. REV. 359, 360 (1992)).

[88] *E.g.*, Wendt v. Host Int'l, Inc. (*Wendt I*), 125 F.3d 806, 811 (9th Cir. 1997); *see also* Lugosi v. Universal Pictures, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring).

[89] Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 625-26 (6th Cir. 2000) (emphasis added).

[90] This test was first enunciated by the Third Circuit in McFarland v. Miller, 14 F.3d 912, 920-21 (3d Cir. 1994). *See also* MCCARTHY, *supra* note 11, § 4:71. Although it has been cited with approval by the Sixth Circuit and some state courts, it has not been considered by the Ninth Circuit. *See, e.g.*, *Landham*, 227 F.3d at 625; Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996).

sociated with him as to be indistinguishable from him in public perception."[91]

In 1992, the Ninth Circuit's decision in *White* left unanswered the question of whether a distinction ought to be made between the celebrity individual and the fictional character the celebrity has played in movies or television.[92] Although Vanna White was not performing the role of a fictional character on the *Wheel of Fortune*, the majority's holding in *White* has opened the door for actors to assert a right of publicity claim for an unauthorized commercial use of a role or character that they have played.[93] The subsequent Ninth Circuit's opinion in *Wendt* avoided tackling the issue of identifiability by characterization. In considering whether the animatronic robots in airport restaurants and bars of the characters Cliff and Norm from the *Cheers* television series evoked the identity of the actors John Ratzenberger and George Wendt, the court instead defined the issue as one of "physical likeness" and remanded the case for trial by jury.[94]

In 1994, the Third Circuit had to consider how far they were prepared to extend the *White* holding in a right of publicity action brought by George McFarland, who played the character Spanky in the movie and television versions of *Our Gang* and *Little Rascals* throughout his movie career; McFarland appeared as Spanky in a total of ninety-five films over six years.[95] The court recognized that the actor playing the character may be the most direct link to the character in the public's mind, even though others may be involved in the creation and presentation of the character to the public. The Third Circuit considered the concurring opinion of Judge Mosk in *Lugosi v Universal Pictures*,[96] which recognized that Bela Lugosi, the actor, was distinguishable from the Count Dracula character he played,[97] but held that whether an actor

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[91] *McFarland*, 14 F.3d at 914.

[92] For an illustration of how the "sweeping standard" in *White* can prevent copyright holders from presenting derivative works see Wendt v. Host Int'l, Inc. (*Wendt II*), 197 F.3d 1284 at 1286-87 (9th Cir. 1999) (Kozinski, J., dissenting).

[93] White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395, 1405 (9th Cir. 1992) (Alarcon, J., dissenting); White v. Samsung Elec. Am. (*White II*), 989 F.2d 1512 at 1515-18 (9th Cir. 1993) (Kozinski, J., dissenting). *See* discussion *infra* Part II.C.3.

[94] Wendt v. Host Int'l, Inc. (*Wendt I*), 125 F.3d 806, 812 (9th Cir. 1997). For a criticism of the decision see Yu, *supra* note 10. The case was eventually settled out of court.

[95] *See McFarland*, 14 F.3d at 915. McFarland commenced an action against the defendant for using "Spanky McFarland" as the name of his restaurant. The restaurant has over 1,000 photos of movie characters, including some of the *Little Rascals*. It also displays two murals of *Our Gang*, which include McFarland, and the menu makes numerous references to the characters. *Id.* at 916.

[96] The majority joint opinion did not discuss identifiability as they held that because the right of publicity descended from the law of privacy, the right of publicity was therefore a "personal" right and could not be assigned to Lugosi's heirs. Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979).

[97] *Lugosi*, 603 P.2d at 432-33 (Mosk, J., concurring). The judicial disagreement in *Lugosi* does not seem to be one as to the legal principle, but rather as to how the rule applied to the facts in that case. Both the majority and the dissent appear to endorse the rule that an actor might play a role in such a unique and distinctive manner that the particular characterisation is indelibly linked with that actor. *See* MCCARTHY, *supra* note 11, § 4:72.

was "inextricably identified" with a character should not hinge on whether the actor had created the character.[98] Applying New Jersey law, the Third Circuit reversed the lower court's summary judgment for the defendant and remanded for the plaintiff to prove at trial that the name Spanky McFarland, as used by the defendant for the restaurant, identified the plaintiff and "not just the little urchin Spanky portrayed in the movie and television series."[99]

In 2000, the Sixth Circuit agreed with the narrower interpretation of a plaintiff's identifiability from a fictional character that he or she has performed, citing *McFarland* with approval; the celebrity plaintiff must prove that: (i) the character's identity and the actor's identity are "inseparable in the public's mind,"[100] and (ii) the unauthorized use "invokes his [or her] own persona, as distinct from that of the fictional character."[101]

Hence, the rule appears relatively straightforward. Public identification has become a triable issue of fact: does the defendant's use primarily identify the role or characterization, or does it identify the actor? If it identifies the actor, then the actor's identity has been used, and the threshold requirement of identifiability has been satisfied. In the "easy" cases,[102] the actor has not only created the character, but has performed it to the extent that he or she is inextricably identified with the character. Examples of these "easy" cases include Charlie Chaplin,[103] the Marx Brothers,[104] Laurel and Hardy,[105] and Woody Allen.[106] However, in the "hard" cases, where the actor is usually either *not* the creator of his or her role or *not* the actor who has played that role exclusively, the courts seem reluctant to hold that the plaintiff was identifiable as a person separate from the character.[107] Moreover, from Judge Mosk's explanation in *Lugosi*, it would seem that a famous historical or literary character "that had been garnished with the patina of age"[108] is less like-

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[98] *McFarland*, 14 F.3d at 920. For a criticism that this test is too narrow, see Langvardt, *supra* note 2, at 392.
[99] *McFarland*, 14 F.3d at 914.
[100] Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 625 (6th Cir. 2000).
[101] *Id.* at 626.
[102] These cases pre-date the "inextricably identified" test laid down by the Third Circuit in *McFarland*, but their analyses of the close association between the actor and the character in the minds of the public contain similar elements.
[103] *See* Chaplin v. Amador, 269 P. 544 (Cal. Ct. App. 1928).
[104] *See* Groucho Marx Prods., Inc. v. Day & Night Co., 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).
[105] *See* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975).
[106] *See* Allen v. Men's World Outlet, Inc., 679 F. Supp. 360 (S.D.N.Y. 1988).
[107] *E.g.*, Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979) (the Count Dracula character is not exclusively identified with Bela Lugosi); West v. Lind, 9 Cal. Rptr. 288 (1960) (the Diamond Lil character is not exclusively associated with Mae West); Nurmi v. Peterson, CV No. 88-5436-WMB, 1989 U.S. Dist. LEXIS 9765 (C.D. Cal. Mar. 29, 1989) (denying Maila Nurmi, the creator-performer of a 1950s television character Vampira, a right of publicity claim against Cassandra Peterson, who created and performed a similar 1980s character Elvira).
[108] *Lugosi*, 603 P.2d at 432.

ly to be exclusively associated or inextricably identified with a particular actor:

> [N]either Lugosi during his lifetime not his estate thereafter owned the exclusive right to exploit Count Dracula any more than Gregory Peck or his heirs could possess common law exclusivity to General MacArthur, George C. Scott to General Patton, James Whitmore to Will Rogers and Harry Truman, or Charlton Heston to Moses.[109]

In particular, Judge Mosk explained that Lugosi had been hired to learn his lines and play a role, and no matter how memorable, his performance "gave him no more claim on Dracula than that of countless actors on Hamlet who have portrayed the Dane in a unique manner."[110] The Third Circuit also gave some examples of how being known for playing a particular role was different from being indistinguishable from the role.[111] The court explained that Adam West's association with the role of Batman or Johnny Weissmuller with Tarzan was different from McFarland's identification with Spanky; while it is "a triable issue of fact as to whether McFarland had become so inextricably identified with Spanky"[112] that his own identity would be invoked by the name Spanky, the Third Circuit thought that "West's identity did not merge into Batman and Weissmuller did not become indistinguishable from Tarzan."[113]

In conclusion, courts other than the Ninth Circuit have adopted a narrower view of the evocative standard in *White*. To obtain a publicity right in a role or character,[114] the plaintiff needs to either: (i) be the substantial creative force behind the character; or (ii) satisfy the requirement that the film or television character has become "so synonymous"[115] or "so associated [with the actor] that it becomes inseparable from the actor's own public image."[116] The discussion here has focused

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[109] *Id.* (Mosk, J., concurring). The majority opinion also noted that other actors like Christopher Lee, Lon Chaney and John Carradine have also played the cinematic role of Dracula in the movies. *Id.* at 427.

[110] *Id.*

[111] McFarland v. Miller, 14 F.3d 912, 920-21 (3d Cir. 1994) (citing Allen v. Men's World Outlet, Inc., 679 F.Supp. 360, 362, 371 (S.D.N.Y.1988); Groucho Marx Prod. Inc. v. Day & Night Co., 523 F.Supp. 485, 491 (S.D.N.Y.1981); Price v. Hal Roach Studios, Inc., 400 F.Supp. 836, 843-44 (S.D.N.Y.1975)).

[112] McFarland v. Miller, 14 F.3d 912, 921 (3d Cir. 1994).

[113] *Id.* at 921 n.15. Although the Third Circuit did not elaborate further, it is clear that unlike the character of Spanky which was exclusively portrayed by George McFarland, a number of actors have played the characters of Batman (e.g. Michael Keaton, George Clooney) and Tarzan (e.g. Lex Barker, Ron Ely, Miles O'Keefe). Moreover, it is also significant that Adam West and Johnny Weissmuller played other roles in television programs and movies.

[114] Like voice appropriation, federal copyright preemption issues also arise in character appropriation cases. However, courts have generally found that the right of publicity in a fictitious character is not preempted by the Copyright Act. *See, e.g.*, Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 623 (6th Cir. 2000); Wendt v. Host Int'l, Inc. (*Wendt I*), 125 F.3d 806, 810 (9th Cir. 1997).

[115] *Landham*, 227 F.3d at 625.

[116] *McFarland*, 14 F.3d at 920.

on the unauthorized use of characterizations in traditional commercial contexts like advertisement, promotion and merchandising. However, it should be noted that artistic and entertainment uses of a character inextricably identified with an actor – for example, a parody of Charlie Chaplin or Spanky McFarland – are usually permitted by the First Amendment.[117]

3. Other Indicia

In the most controversial category of identifiability, the courts have held that a combination of elements outside of the traditional categories of name and likeness may be considered by the jury when determining whether the plaintiff is in fact identified from the defendant's use. The Ninth Circuit's decision in *White* has "probably gone the farthest of any case in any court in the United States of America in protecting publicity rights."[118] The expansive approach in *White* may have a considerable influence in other state jurisdictions because of the deference that Ninth Circuit decisions are usually given in cases concerning publicity rights;[119] it is also binding precedent on California courts. Refusing to "permit the evisceration of the common law right of publicity,"[120] the Ninth Circuit majority held that the identifiability of the plaintiff in a common law right of publicity action extended beyond name and likeness to anything that evoked the plaintiff's personality.[121] Thus like a name, likeness, voice, or fictitious character, different combinations of objects, symbols, gestures, words, music, and other indicia can also trigger the public's recognition of the plaintiff.

Beginning with *Motschenbacher v. R.J. Reynolds Tobacco Co.* in 1974, the Ninth Circuit held that a triable issue of fact existed in California law as to whether a racing car driver was identifiable by a distinctive racing car used in an advertisement which he claimed was closely associated with him.[122] In 1977, the Appellate Division of the New York Supreme Court referred to *Motschenbacher* with approval when deciding that the "combination of New Year's Eve, balloons, party hats, and "Auld Lang Syne'" in a television commercial raised an issue of identifiability in a right of publicity claim which should proceed to trial.[123] In that case, Guy Lombardo had invested forty years in develop-

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[117] *See, e.g.,* Winter v. DC Comics, 69 P.3d 473 (Cal. 2003); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).
[118] Clay, *supra* note 38, at 486.
[119] Langvardt, *supra* note 2, at 330-31.
[120] White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395, 1399 (9th Cir. 1992).
[121] *Id.* at 1398-99. The majority referred to *Motschenbacher*, *Midler*, and *Carson* with approval.
[122] Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974). In its television advertisement, the defendant used a photograph that showed the plaintiff's racing car – with its "distinctive decorations" – in the foreground; however, the plaintiff's facial features were obscured, and the number on the racing car was changed from "11" to "71." *Id.* at 822, 827.
[123] Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 664 (App. Div. 1977). It should be noted that no independent actionable right of publicity exists in New York today. Ste-

ing his widely recognized public personality as "Mr. New Year's Eve," performing with his band on New Year's Eve.

Decided in 1983, *Carson v. Here's Johnny Portable Toilets Inc.* continued the trend of cases recognizing that different indicia of identity can evoke a particular celebrity in the minds of the audience.[124] Concerned with the defendant free-riding on the economic associative value of Johnny Carson's identity, the Sixth Circuit held that "[t]he right of publicity . . . is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used."[125] Focusing on the fact that "the public tends to associate . . . the words 'Here's Johnny' with the plaintiff,"[126] the court found that "Carson's identity *as a celebrity*"[127] has been appropriated. The majority emphasized that there would have been no violation of Carson's right of publicity if his real name John William Carson was used; the crux of the issue was whether the commercial use *identified* the celebrity in the minds of the audience so as to capture the pecuniary value of the celebrity identity.[128]

In 1992, the Ninth Circuit handed down its watershed decision *White v. Samsung*.[129] Samsung had run a print advertising campaign promoting its consumer electronics that capitalized on the audience's familiarity with particular personalities and trends in popular culture in order to depict outrageous outcomes for Samsung products in the future. Unlike the other celebrities used in the campaign, White neither consented to the advertisements nor was she paid. In one of the advertisements for video-cassette recorders (VCRs), a robot was dressed in a wig, gown and jewelry reminiscent of Vanna White's hair and dress. The robot was posed next to a game board which was instantly recognizable as the *Wheel of Fortune* game show set, in a stance for which White was famous. The caption read "Longest-running game show. 2012 A.D." Vanna White, the letter-turner of *Wheel of Fortune*, claimed, *inter alia*, that Samsung infringed both her common law and statutory right of publicity.

Under the CCC § 3344(a), White has the exclusive right to use her "name, voice, signature, photograph or likeness" for commercial purposes. However, Samsung did not use any of the enumerated indicia

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phano v. News Group Publ'ns, Inc., 474 N.E.2d 580 (N.Y. 1984).

[124] Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 832 (6th Cir. 1983). Johnny Carson had licensed his catch phrase "Here's Johnny" to a chain of restaurants and was president of and part owner of an apparel company that sold clothing featuring the plaintiff's name and likeness under the label "Here's Johnny." *Id.* at 833.

[125] *Id.* at 835. The majority relied on *Hirsch* (use of celebrity's nickname), *Ali* (use of likeness), and *Motschenbacher* (evocative use) to support the extension of indicia of identity.

[126] *Id.* at 836.

[127] *Id.* at 837 (emphasis added).

[128] *Id.* at 837-38.

[129] White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395 (9th Cir. 1992).

and the Ninth Circuit correctly dismissed her statutory claim.[130] However, the majority, relying on *Motschenbacher*, *Midler*, and *Carson*, held that so long as the robot in the Samsung advertisement reminded the audience of Vanna White, regardless of whether they believed that White was endorsing the advertised product, a jury could decide whether Samsung had infringed her right of publicity; hence, the case was remanded for trial.[131] In cases like *White*, *Carson*, and *Lombardo*, the celebrity plaintiffs were indeed well-known personalities who enjoyed a heightened media presence. The *Wheel of Fortune* game show, one of the most popular game shows in U.S. television history, has a daily audience viewership of about forty million,[132] making Vanna White a widely recognized household celebrity.

Exhibiting a reluctance to circumscribe the boundaries of the expanding indicia of identity, the majority asserted, without explanation, that "[a] rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth."[133]

In the "evocative-of-identity" test enunciated by the *White* majority, if an advertiser uses visual or auditory cues that evoke a celebrity's persona in the minds of the audience, then the advertiser would have infringed the celebrity's right of publicity. According to the majority, it is "not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant had done so."[134]

D. *Interim Conclusions*

The courts have approached the issue of identification over the last three decades with an increasing appreciation of the associative value that the celebrity personality commands in contemporary society. The "evocative-of-identity" rule as stated by the *White* majority resonates with the core principle articulated in the Restatement (Third) of Unfair Competition: "[o]ne who appropriates the *commercial value of a person's identity* by using without consent the person's name, likeness, or *other indicia of identity* for purposes of trade is subject to liability."[135] It is generally accepted that a "highly valuable identity is attained when

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[130] *White I*, 971 F.2d at 1396-97.
[131] *Id.* at 1399. White subsequently received $403,000 in damages. White v. Samsung Elec. Am., Inc. (*White III*), No. CV-886499 (C.D. Cal. Filed Jan. 20, 1994).
[132] *White I*, 971 F.2d at 1396.
[133] *Id.* at 1398. This view was endorsed in Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 624-25 (6th Cir. 2000) as well as Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 414 (9th Cir. 1996).
[134] *White I*, 971 F.2d at 1398.
[135] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (emphasis added). *See also* Dogan, *supra* note 2, at 303 ("The right of publicity is, at core, a business right to control use of one's identity in commerce.").

the name, image, or likeness of an individual is readily identifiable"[136] and the right of publicity protects the individual celebrity's exclusive use of "the *commercial identifications* of him or herself."[137]

If the audience has not identified the plaintiff from the defendant's use – i.e. the plaintiff has not been called forth in or brought to the minds of the audience – then there can be no taking of anything of value from the plaintiff. As demonstrated in this Part, whether it is the use of a name as a symbol of identity,[138] a likeness that readily identifies the plaintiff,[139] a distinctive voice that is widely known,[140] a character that is inextricably identified with the plaintiff,[141] or a combination of different elements that included words, objects and symbols,[142] the plaintiff is *evoked* in the minds of the audience. For example, a well-known phrase like "Here's Johnny" can evoke a more vivid identification of the celebrity than a visual likeness. The Illinois Right of Publicity Act already recognizes that identity is "any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener."[143] The Pennsylvania statute is similarly worded.[144] In Texas, courts have held that the right of publicity "may be violated when a defendant employs an aspect of that person's persona in a manner that symbolizes or identifies the person."[145] Thus, there is no real need to enumerate specific actionable indicia of identity. In addition, the objective of the right of publicity – to prevent the unauthorized commercial appropriation of a valuable persona – is better served by the adoption of an all-encompassing evocative identification standard. However, evocation is a necessary, but not sufficient, prerequisite to a right of publicity claim.[146] What the numerous critics of the *White* approach appear to

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[136] David M. Schlachter, *Adjudicating the Right of Publicity in Three Easy Steps*, 14 J.L. & POL'Y 471, 477 (2006).
[137] *Id.* at 479 (emphasis added).
[138] *E.g.*, Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003); Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 414 (9th Cir. 1996); Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).
[139] *E.g.*, Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978).
[140] *E.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).
[141] *E.g.*, McFarland v. Miller, 14 F.3d 912, 921 (3d Cir. 1994); Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619 (6th Cir. 2000).
[142] *E.g.*, White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395 (9th Cir. 1992); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661 (App. Div. 1977).
[143] Illinois Right of Publicity Act, 765 ILL. COMP. STAT. 1075/5; Toney v. L'Oreal USA, Inc., 406 F.3d 905, 908 (7th Cir. 2005).
[144] 42 PA. STAT. ANN. § 8316(e) (2010) ("Any attribute of a natural person that serves to identify that natural person to an ordinary, reasonable viewer or listener."); Facenda v. NFL Films, Inc., 488 F. Supp. 2d 491, 501 (E.D. Pa. 2007).
[145] Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 591 (N.D. Tex. 1999); Elvis Presley Enters., Inc. v. Capece, 950 F. Supp. 783, 801 (S.D. Tex. 1996). The Texas courts have cited cases like *White*, *Carson*, *Motschenbacher*, *Ali*, and *Hirsch* with approval in extending protection to all aspects of persona that can identify the plaintiff.
[146] *E.g.*, Weiler, *supra* note 2, at 269 ("Yet judicial inquiry should not end, nor should liability

have overlooked is the fact that evocation does not equal liability; there are yet other hurdles, such as the First Amendment defense, which the plaintiff has to overcome.

Drawing from relevant writings in cultural studies, the next Part will consider how cultural studies can support the adoption of an overarching evocative identification test.

III. EVOCATIVE USE AND IDENTIFICATION

It is a common view in cultural studies that the celebrity personality is "imbued with euphoric values,"[147] and that the aim of advertisements featuring celebrities is to produce an audience desire to resemble physically the idealized image or to identify with the celebrity personality through the consumption of products associated with the celebrity.

As outlined in my earlier work,[148] writings in cultural studies suggest that a contemporary celebrity is any individual who is widely recognized by the public, and therefore the distinctive characteristics of a particular celebrity has the capacity to trigger instant recognition amongst the public. Section A will demonstrate, through an evaluation of key writings on the definition of the contemporary celebrity, how the mass circulation of the celebrity contributes to widespread public recognition. This is pertinent to the issue of identifiability in a right of publicity claim since it is a question of fact that is put to the jury who represents the ordinary viewer or listener. Section B argues that these findings help strengthen the case for the judicial adoption of an evocation identification standard that extends actionable indicia of identity beyond name and likeness to all aspects of persona that evoke the celebrity in the minds of the audience.

A. *The "Well-Knownness" of a Celebrity: A Cultural Studies Perspective*

The celebrity personality is seen in cultural studies to be a cultural symbol infused with different meanings for the audience. Due to the meticulously constructed public personae of many celebrities, particularly movie stars and sports icons, the semiotic sign of these well-known individuals is usually interpreted by the audience to represent a defined cluster of affective meanings. Daniel Boorstin's definition of a celebrity, "a person who is known for his well-knownness,"[149] has been adopted as a starting point for a broad definition of a contemporary celebrity, based on a ubiquitous media presence and public recognition by

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unfailingly ensue, solely upon a determination that viewers of an advertisement can identify a celebrity from certain clues.").

[147] ROLAND BARTHES, *The Rhetoric of the Image*, *in* IMAGE-MUSIC-TEXT 32, 35 (Stephen Heath trans., 1977).

[148] *See* Tan, *supra* note 3, at 945-49, 955-75.

[149] DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 57 (1961). Boorstin also calls the celebrity the "human pseudo-event." *Id.*

influential cultural studies scholars like David Marshall,[150] Chris Rojek,[151] Graeme Turner,[152] and Garry Whannel.[153] According to Marshall, "[i]n the public sphere, a cluster of individuals are given greater presence and a wider scope of activity and agency than are those who make up the rest of the population . . . . We tend to call these overtly public individuals *celebrities*."[154] Similarly, Turner et al. suggest that "celebrities are people that the public is interested in; if the public is interested in this person, they are a celebrity; therefore, anyone the public is interested in is a celebrity."[155]

Cultural studies writings are notable in their overwhelming acceptance that the contemporary celebrity "is characterized by an individual distinction, mass appeal, ubiquity and popular authorship."[156] Although criticism has been rife on the increasing ease of becoming a celebrity based on widespread media circulation instead of acquiring fame based on acting, sporting, artistic, literary, or intellectual abilities, what cultural studies scholars do agree on is the heightened visibility in the media that is characteristic of the contemporary celebrity. What is relevant to the issue of identifiability in a right of publicity claim is whether the plaintiff is well-known to a significant section of the public, or as McCarthy puts it, "a more than de minimis number of ordinary viewers of the defendant's use identify the plaintiff."[157] Individuals from almost any field, be it film, sport, music, television, business or even culinary arts, can be elevated to the status of celebrity.[158] It is this widespread public identification, both of the image and the embodied values/ideals, that defines a celebrity, and consequently imparts to it a commercial value in the context of consumption. Because a celebrity is characterized by his or her "well-knownness" in society, his or her commercial value may be easily captured without an obvious reference to name or likeness, as the celebrity can be evoked by many other means familiar to the consuming public.[159] This argument is supported by both the in-

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[150] P. DAVID MARSHALL, CELEBRITY AND POWER: FAME IN CONTEMPORARY CULTURE 11 (1997).
[151] CHRIS ROJEK, CELEBRITY 18, 76-77 (2001). In particular, Rojek comments that "[c]elebrity power depends on immediate public recognition." *Id.* at 76.
[152] GRAEME TURNER, FILM AS SOCIAL PRACTICE 144 (4th ed. 2006); GRAEME TURNER, UNDERSTANDING CELEBRITY 5 (2004).
[153] GARRY WHANNEL, MEDIA SPORTS STARS: MASCULINITIES AND MORALITIES 42-43 (2002).
[154] MARSHALL, *supra* note 150, at ix.
[155] GRAEME TURNER ET AL., FAME GAMES: THE PRODUCTION OF CELEBRITY IN AUSTRALIA 9 (2000). *See also* TURNER, UNDERSTANDING CELEBRITY, *supra* note 152, at 3; DANIEL HERWITZ, THE STAR AS ICON: CELEBRITY IN THE AGE OF MASS CONSUMPTION 16 (2008).
[156] Tan, *supra* note 3, at 938.
[157] *See* MCCARTHY, *supra* note 11, § 3:17 and accompanying text. There must be "some 'de minimis' rule to filter or screen out the frivolous cases where only the plaintiff and a few sympathetic relatives and friends can see any connection between defendant's use and plaintiff." *Id.* § 3:20.
[158] *See generally*, IRVING REIN, PHILIP KOTLER & MARTIN STOLLER, HIGH VISIBILITY: THE MAKING AND MARKETING OF PROFESSIONALS INTO CELEBRITIES (1997).
[159] This was noted in passing reference by the *White I* majority. White v. Samsung Elec. Am., Inc. *(White I)*, 971 F.2d 1395, 1399 (9th Cir. 1992).

creasing circulation of the performances of by the celebrity *in* his or her chosen field[160] and the incessant popular media coverage of the celebrity's activities *outside* this field[161] which showcase particular aspects of the celebrity individual that the audience later can easily bring to mind or recollect.

The courts appear to implicitly recognize this notion of widespread recognition when putting the "well-knownness" of the plaintiff to the test before the jury on the identifiability issue. If one is not well-known, then the law often finds no protectable value in one's identity. Although prevailing dicta from the courts indicate that all individuals in theory have a right of publicity,[162] a number of recent cases have required that the plaintiff's "name, likeness, or persona had such value prior to the plaintiff's association with [the defendant's product]."[163] In *Pesina v. Midway Mfg. Co.*, a martial arts expert who had no "celebrity status or public recognition" failed to prove that the use of a "Mortal Kombat" video game character modeled on his movement infringed his publicity or trademark rights.[164] Similarly, in *DeClemente v. Columbia Pictures Indus.*, the plaintiff's public personality as the 'Karate Kid' simply "ha[d] not reached the magnitude of public notoriety necessary to be actionable under the statute as a matter of law."[165]

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[160] This is sometimes referred to as "intertextual knowledge" for film stars or "on-field performances" for sport celebrities. *See, e.g.*, Christine Geraghty, *Re-examining Stardom: Questions of Texts, Bodies and Performance*, *in* STARDOM AND CELEBRITY: A READER 98, 106-07 (Sean Redmond & Su Holmes eds., 2007); WHANNEL, *supra* note 153, at 30-39.

[161] Terms like "extratextual" or "narrativisations" have been used to refer to the type of coverage given to film stars and celebrity athletes in popular media like the tabloids, fanzines and infotainment programs. *See, e.g.*, Geraghty, *supra* note 160; WHANNEL, *supra* note 153, at 52-63. In fact, it has been claimed that "mass media use is now the third-ranked activity after work and sleep" in the United States. JIB FOWLES, STARSTRUCK: CELEBRITY PERFORMERS AND THE AMERICAN PUBLIC 263 (1992).

[162] *E.g.*, Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974); Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 792 (Ct. App. 1993); Onassis v. Christian Dior-N.Y., Inc., 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

[163] Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996). In particular, the Supreme Courts of Georgia, Utah, Alabama and Oregon have rejected claims brought by non-celebrities. Other jurisdictions like the District of Columbia, Kentucky, Maryland, Minnesota, Missouri, Ohio and Texas have also used strong language disfavoring such claims. In addition, courts in California, Illinois and New York have at times required the plaintiff to show that his or her "well-knownness" has endowed his or her identity with commercially exploitable opportunities. *See, e.g.*, Schifano v. Greene Cnty. Greyhound Park, Inc., 624 So. 2d 178, 181 (Ala. 1993); Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982); Anderson v. Fisher Broad. Cos. Inc., 712 P.2d 803, 812-13 (Or. 1986); Cox v. Hatch, 761 P.2d 556, 564 (Utah 1988); *see also* Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) (applying Texas law); Brewer v. Hustler Magazine, Inc., 749 F.2d 527, 530 (9th Cir. 1984) (applying California law); Delan v. CBS, Inc., 458 N.Y.S.2d 608, 615 (App. Div. 1983). *But see Dora*, 18 Cal. Rptr. 2d at 792; Ainsworth v. Century Supply Co., 693 N.E.2d 510, 514-15 (Ill. App. Ct. 1998); Alicia M. Hunt, *Everyone Wants to Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605, 1608, 1651 (2001).

[164] *Pesina*, 948 F. Supp. at 42. "[O]nly 6% of 306 Mortal Kombat users identified Mr. Pesina as the model for the video game character." *Id.* at 42.

[165] DeClemente v. Columbia Pictures Indus., Inc., 860 F. Supp. 30, 53 (E.D.N.Y. 1994). According to the evidence, the plaintiff was and is known as the Karate Kid only to a small group of

Widespread recognition appears to be the *sine qua non* of the contemporary celebrity. In addition, the sustained interest of the public in any particular celebrity is only possible if the cultural producers are able to continuously provide them with the celebrity commodity.[166] The critical role that the popular media, as a cultural producer, has played in the circulation of the celebrity in society resulting in an individual's recognition by numerous audience segments has led some scholars to equate the celebrity with a "spectacle."[167] In cultural studies, the celebrity personality may be seen as a commodity spectacle that is created and sustained by a combination of forces in advertising, marketing, public relations, and journalism.

Thus, the complex, and often complementary, interactions of the constituents of the celebrity trinity combine to endow this persona with a set of specific personality traits over time, and the individual of whom "the descriptions are predicated has spatio-temporal continuity, and can thus be identified."[168] An analysis of the literature in metaphysics, philosophy, and sociology about the concept of identity is beyond the scope of this article. However, Catherine McCall's comprehensive study on the concept of identity, with its critique of the works of influential scholars in this area like P.F. Strawson,[169] John Perry,[170] and Amelie Rorty,[171] concludes that the understanding of any individual as a person is a "public understanding" as a consequence of "properties attributed to the individual by others."[172] Therefore, an individual is identified not just by "physical attributes which can be recorded and measured," but also by "properties or attributes which are *thought of* the entity."[173] In other words, what makes a contemporary celebrity so well-known is a result of a public identity that is reinforced through a social process of where the celebrity is "individuated, identified and re-identified."[174] These observations on identity being located in the social

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people who learned and taught karate in Queens and Brooklyn during the mid-1960s, and perhaps in Florida in the mid-1970s, and to any business associates he developed a relationship with over the years. *Id.* at 53.

[166] The term "commodity" is used here broadly to include information on the celebrity (*e.g.*, gossip and photographs), products relating to the celebrity (*e.g.*, fan-related merchandise) and most importantly, the celebrity as a product (*e.g.*, movies featuring a celebrity actor or sports events featuring the celebrity athlete in competition).

[167] *See generally* GUY DEBORD, THE SOCIETY OF THE SPECTACLE (1967); DOUGLAS KELLNER, MEDIA SPECTACLE (2003).

[168] CATHERINE MCCALL, CONCEPTS OF PERSON: AN ANALYSIS OF CONCEPTS OF PERSON, SELF AND HUMAN BEING 180 (1990).

[169] *E.g.*, P. F. STRAWSON, INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS (1959); PHILOSOPHICAL SUBJECTS: ESSAYS PRESENTED TO P. F. STRAWSON 272 (Zak Van Straaten ed.,1980).

[170] *E.g.*, John Perry, *The Problem of Personal Identity*, *in* PERSONAL IDENTITY 3 (John Perry ed., 1975); John Perry, *The Importance of Being Identical*, *in* THE IDENTITIES OF PERSONS 67 (Amelie Rorty ed., 1976).

[171] *E.g.*, Amelie Oksenberg Rorty, *Persons, Policies and Bodies*, 13 INT'L PHIL. Q. 63 (1973); THE IDENTITIES OF PERSONS (Amelie Rorty ed., 1976).

[172] MCCALL, *supra* note 168, at 178.

[173] *Id.* at 177 (emphasis added).

[174] *Id.* at 187. This dynamic approach to identification allows for the audience to take into ac-

framework of language and cultural communication are also supported by numerous cultural studies scholars like Richard Dyer,[175] P. David Marshall,[176] and Graeme Turner[177] in their research on the contemporary production of celebrities.

The circulation of a particular personality in contemporary society can happen through numerous channels like print, broadcast, film, Internet, merchandizing, and even through daily social conversations. Through these channels, a celebrity personality is reproduced countless times with its recognition gaining an ever-increasing familiarity amongst members of the public with each interaction.[178] These observations support the Ninth Circuit's assumption in *White* that the most popular celebrities are the easiest to evoke. For example:

> A film star's image is not just his or her films, but the promotion of those films and the star through pin-ups, public appearances, studio hand-outs and so on, as well as interviews, biographies and coverage in the press . . . . Further, a star's image is also what people say or write about him or her, as critics or commentators, the way the image is used in other contexts such as advertisements, novels, pop songs, and finally the way the star can become part of the coinage of everyday speech.[179]

For the purposes of illustrating how certain distinctive characteristics of celebrities can gain widespread public recognition and thereby merit protection by publicity right laws, the following sections will briefly consider how celebrities may be circulated in the popular media.

1. "Traditional" Coverage

First, through the so-called "traditional" portrayal of the celebrities in their chosen fields of endeavor, the public becomes familiar with the names and likenesses of these individuals. For film stars, the widespread release of movies will initially thrust the actors into public consciousness[180] and the continued circulation of their images and information in advertising and in the popular media's coverage of the their personal lives will maintain a public visibility. For television celebrities, their familiarity with the audience is enhanced by their constant

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count changes in physical attributes over time so that a celebrity's public identity can be constantly renewed.

[175] *E.g.*, RICHARD DYER, STARS 2-4, 6-8, 24-32 (1979).

[176] *E.g.*, MARSHALL, *supra* note 150, at 61-71.

[177] *E.g.*, TURNER, UNDERSTANDING CELEBRITY, *supra* note 152, at 4-20.

[178] *E.g.*, JEAN BAUDRILLARD, SIMULATIONS 11 (Paul Foss et al. trans., Semiotext[e] 1983 ed.); *see also* TURNER, UNDERSTANDING CELEBRITY, *supra* note 152, at 34-41; TURNER ET AL., *supra* note 155, at 13.

[179] Madow, *supra* note 30, at 193.

[180] Despite a slump in cinema attendances in 2005, ticket sales in the United States hit an all-time high in 2007. These figures however do not capture the improved access of the audience to other Web-based entertainment options. Sue Zeidler, *MPAA Says US Movie Box Office Hit Record in 2007*, NEWS.COM.AU, Mar. 6, 2008, http://www.news.com.au/entertainment/story/0,26278,23328064-7485,00.html.

appearances in the intimate settings of the living rooms and kitchens of viewers all around the world.[181] In the sports world, global television and Web broadcasts of the Olympics and the FIFA World Cup, and major tournaments in golf, tennis, basketball, baseball, and soccer, can also result in high-performing athletes becoming household names.[182]

2. Advertising

Second, the growing use of celebrities in advertising is a highly managed process for maintaining their public visibility. It is important to note that advertising not only uses celebrities, it also helps their careers and publicity.[183] An advertising campaign, especially a global advertising campaign with a multi-million dollar budget like Nike and TAG Heuer, exposes a particular celebrity to large segments of the public,[184] contributing to a greater awareness of not only the product, but also the featured celebrity. In a visual print or broadcast advertisement, it is often an individual's "likeness" that is used by the advertiser, and it is this "likeness" that is readily identified by the audience-consumer. At the same time, these advertisements also transmit a particular identity configuration of each celebrity to the audience, fixing particular images of each individual celebrity in the minds of the viewers.

Because different advertisers can use a particular celebrity to endorse a wide range of products, the cumulative effect of these advertisements can reinforce a mental image of the celebrity, to the extent that even the use of a distinctive hairstyle at a specific point in time (like David Beckham's iconic "Mohican-Mohawk" in 2001-2002) can evoke the celebrity in the absence of visible facial features.[185] Com-

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[181] *E.g.*, John Langer, *Television's Personality System*, 4 MEDIA, CULTURE & SOC'Y 352 (1981). Oprah Winfrey, rated one of the most powerful celebrities by Forbes, hosts *The Oprah Winfrey Show*, the highest-rated talk show in television history, which is seen by 15-20 million viewers a day in the United States and airs in 132 countries. *See The Celebrity 100*, FORBES.COM, June 3, 2009, http://www.forbes.com/lists/2009/53/celebrity-09_The-Celebrity-100_Rank.html; New York TV Show Tickets, Oprah Winfrey Show – The Many Faces of Oprah, http://www.nytix.com/TV_Shows/OprahWinfrey/oprahwinfrey.html (last visited Jan. 24, 2010).

[182] For example, the 2004 Athens Olympic Games had over 300 channels broadcasting to 220 countries and territories resulting in a record of 3.9 billion people having access to the coverage. The Beijing Organizing Committee for the Games of the XXIX Olympiad, *Global TV Viewing of Athens 2004 Olympic Games Breaks Records*, Oct. 12, 2004, http://en.beijing2008.cn/16/87/article211928716.shtml. For an analysis of the media coverage of sports, see WHANNEL, *supra* note 153, at 30-39, 190-212.

[183] *See* BOORSTIN, *supra* note 149, at 58; *see also* Joshua Gamson, *The Assembly Line of Greatness: Celebrity is Twentieth-Century America*, *in* STARDOM AND CELEBRITY: A READER 141, 150 (Sean Redmond & Su Holmes eds., 2007). According to Pringle, at least 20% of all advertising uses a celebrity. HAMISH PRINGLE, CELEBRITY SELLS 10 (2004).

[184] A famous example is "The Jordan Effect," a result of the phenomenal worldwide success of Nike's collaboration with basketball icon Michael Jordan. *E.g.*, Lynette Knowles Mathur et al., *The Wealth Effects Associated with a Celebrity Endorser: The Michael Jordan Phenomenon*, 37 J. ADVERTISING RES. 67 (1997); ROBERT GOLDMAN & STEPHEN PAPSON, NIKE CULTURE: THE SIGN OF THE SWOOSH (1998). On the similar celebrity endorsement power of David Beckham this century, see ANDY MILLIGAN, BRAND IT LIKE BECKHAM: THE STORY OF HOW BRAND BECKHAM WAS BUILT (2004).

[185] PRINGLE, *supra* note 183, at 68-69. *See also* MILLIGAN, *supra* note 184, at 81-84 (discussing

plementing the circulation of a celebrity's identity in advertisements, the constant coverage of a celebrity's life by the tabloid media thrusts even more information and images into the public eye. For example, Beckham's hairstyles are chronicled in the minutest detail in the tabloids, and even in mainstream newspapers, to the extent that a more than de minimis number of members of the public are likely to be familiar with his latest image.

3. Popular "Infotainment" Media

Third, the popular infotainment[186] media, which includes print, broadcast, and Internet, represents an effective channel of raising the public awareness of celebrities through a relentless coverage of information and images relating to these individuals.[187] Generally, the efforts of the cultural producers – the studios, public relations managers, and advertisers – in promoting the ubiquity of the celebrities have been significantly aided by the proliferation of tabloid magazines, infotainment programs, and Internet sites.[188] While one may view the tabloid press and its attendant paparazzi to be infringing on the privacy of celebrities,[189] the sustained coverage of any celebrity invariably keeps him or her in the public eye and maintains his or her "well-knownness." Thus the relationship between the celebrity individual and the media, in particular the paparazzi, may be antagonistic, but at the same time, it is symbiotic.[190] Although the scandalous exposures may sometimes threaten the professional survival of the celebrities, the "unparalleled personal visibility" makes them "irresistible as the quickest route to the public."[191] On the Internet, celebrity pictorial sites proliferate. On television, there are numerous programs devoted to news coverage of celebrities and their lifestyles.[192] Even the mass-market women's maga-

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Beckham's defining hairstyles).

[186] "Infotainment" has been defined as "information-based media content or programming that also includes entertainment content in an effort to enhance popularity with audiences and consumers." *See* DAVID DEMERS, DICTIONARY OF MASS COMMUNICATION AND MEDIA RESEARCH: A GUIDE FOR STUDENTS, SCHOLARS AND PROFESSIONALS 143 (2005).

[187] Boorstin makes a trenchant comment that "celebrities are 'the names' who, once made by news, now make news by themselves." BOORSTIN, *supra* note 149, 61. *See also* WHANNEL, *supra* note 153, at 203.

[188] An integrated media presence linking television broadcast with an online infotainment site is common as key players in the industry compete for the audience's attention. *E.g.*, ET Online, http://www.etonline.com (last visited Jan. 24, 2010); TMZ, http://www.tmz.com (last visited Jan. 24, 2010).

[189] *E.g.*, DAVID GILES, ILLUSIONS OF IMMORTALITY: A PSYCHOLOGY OF FAME AND CELEBRITY 96-99 (2000).

[190] *E.g.*, TURNER, UNDERSTANDING CELEBRITY, *supra* note 152, at 36; JOSHUA GAMSON, CLAIMS TO FAME: CELEBRITY IN CONTEMPORARY AMERICA 86-89 (1994).

[191] TURNER, UNDERSTANDING CELEBRITY, *supra* note 152, at 76. As a result, issues relating to infringing the celebrity's right of privacy often arise. *E.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Time, Inc. v. Firestone, 424 U.S. 448, 454 (1974); *Eastwood*, 198 Cal. Rptr. at 346; Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

[192] Globally syndicated programs like *Entertainment Tonight* focus on celebrity information, while highly popular talk shows like *The Oprah Winfrey Show* ("*Oprah*") frequently feature celebrity guests. *Oprah* boasts about 6.9 million weekly viewers in the United States (ranked 4th), while *Entertainment Tonight* has 6.8 million (ranked joint 4th). TV By The Numbers, Syndicated

zines have increased their focus on celebrity culture.[193] Celebrity gossip and news weeklies like *Star*, *National Enquirer*, *Hello!*, and *OK!*, which deal with almost nothing but celebrities, are globally syndicated and their content includes a combination of paparazzi photographs, speculative stories, and collaborative celebrity features. With the rising popularity of the Internet in the last few years, the tabloid press has moved online, probably capturing an even larger audience base.[194] The proliferation of tabloids at checkout counters of supermarkets, especially in the US, has also contributed to the increased exposure of celebrities and a concomitant increase in the household recognition of the celebrities featured within its pages.[195]

In addition to their widespread recognition, celebrities "succeed by skillfully distinguishing themselves from others essentially like them,"[196] by acquiring and honing a particular appearance, gesture, voice, or other attributes. In writing on why celebrities enhance brand familiarity and favorability, it was observed that celebrities "have very high public awareness and people are able to visualize them very easily as they are so familiar with them."[197] This evocative aspect of a celebrity – through the "marginal differentiation of their personalities"[198] that leads to easy audience recall – provides the impetus for the legal recognition and protection of the commercial value of the celebrity identity. The emotional affinity the audience may have with a particular celebrity often translates to some form of imitation, where the consumer would purchase products associated with their favorite celebrities to become more like them. What the above demonstrates is that the infotainment coverage of a particular celebrity will reveal far more than a film, a telecast of a sporting event, or an advertisement that features a well-groomed image or likeness of the celebrity. Because of the extensive circulation of the infotainment television programs and the tabloid press, their continuous focus on specific themes relating to each individual celebrity may result in the audience perceiving certain attributes, symbols, or objects to be "closely associated" with that celebrity.[199]

TV Show Ratings, http://tvbythenumbers.com/category/ratings/syndicated/nielsen-weekly-top-syndicated-tv-show-ratings (last visited Jan. 24, 2010).

[193] ANN GOUGH-YATES, UNDERSTANDING WOMEN'S MAGAZINES: PUBLISHING, MARKETS AND READERSHIPS 136 (2003). Even the most highbrow of broadsheet newspapers like *The Times (UK)* are increasingly celebrity-driven, often featuring a celebrity on its front page. PRINGLE, *supra* note 183, at 10.

[194] This has also resulted in a decline in the sales of daily tabloids like *The Sun* in the UK. Kate Holton, *UK's Sun Tabloid's Circulation Falls Below 3 Mln*, REUTERS UK, Jan. 11, 2008, http://uk.reuters.com/article/idUKL1111362720080114.

[195] *E.g.*, TURNER ET AL., *supra* note 155, at 137.

[196] BOORSTIN, *supra* note 149, at 65.

[197] PRINGLE, *supra* note 183, at 68-69.

[198] BOORSTIN, *supra* note 149 at 65.

[199] *E.g.*, Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974). The court held that the preliminary evidence that several persons who said they had immediately recognized the plaintiff's car from the advertisement was sufficient to enable Motschenbacher to prove the issue of identifiability at trial.

Like in the case of David Beckham, the features on his hairstyles and his tattoos can result in these distinctive symbols of his identity being "readily identifiable" as David Beckham, the celebrity footballer, by members of the public.[200] It is most likely that a significant number of people could point to a Mohican-Mohawk hairstyle in 2001-2002, which was extensively copied especially by the youth, and say that is a Beckham hairstyle. Hence, an advertiser who features the back of the head of a Caucasian model sporting a Mohican, with perhaps a diamond ear-stud and a soccer ball, may be evoking the identity of Beckham "by either consciously or subconsciously conjur[ing] up images"[201] of Beckham.

In summary, the media coverage, as well as the popular narratives found on Internet sites and in other social contexts, have all contributed to the creation and circulation of a well-recognized public personality for particular individuals in society whom we call "celebrities." The "well-knownness" of these individuals is enhanced by transnational corporations who sign on celebrities to front their advertising campaigns. This further exposure of a particular celebrity will in turn heighten the "well-knownness" of that personality, leading to even greater media and public attention: "[a]nything that makes a well-known name still better known automatically raises its status as a celebrity."[202]

The following section will suggest that the proposed all-encompassing evocative standard of identification in a right of publicity claim is supported by the ubiquitous circulation and widespread recognition of the contemporary celebrity; the audience, who will be familiar with the myriad manifestations of a particular celebrity, does not require an obvious or literal reference to name or likeness in order to identify that celebrity.

B. *Evocative Identification of a Well-known Individual by the Audience*

This section addresses the controversy surrounding the judicial expansion of the meaning of indicia of identity beyond name and likeness to an indeterminate range of identifying characteristics evocative of the celebrity. The dissents in cases like *Carson*, *White*, and *Wendt*, as well as a number of academics, have highlighted the dangers of expanding the right of publicity as a result of an overtly generous interpretation of the identifiability requirement of a right of publicity claim. However, the broad interpretation given to identity is supported by perspectives in cultural studies and is in line with a contemporary understanding of the

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[200] According to Whannel, a "novel or striking appearance helps to bring a [sporting] star to public attention. As the fame of the star grows, appearance becomes more central as a signifier . . . [and] in the construction of star images." WHANNEL, *supra* note 153, at 194.
[201] Newcombe v. Adolf Coors Co., 157 F.3d 686, 693 (9th Cir. 1998).
[202] BOORSTIN, *supra* note 149, at 58.

associative value of a celebrity's identity.

Although the prevailing orthodoxy is that every person has a right of publicity, regardless of whether he or she is a celebrity or non-celebrity,[203] courts have in practice awarded summary judgment to the defendant when the plaintiff is unable to make a prima facie case based on the plaintiff's "well-knownness" to a more than de minimis number of ordinary viewers of the defendant's use.[204] The rationale appears to have been aptly captured in the argument advanced by Peter Felcher and Edward Rubin: unless the plaintiff has the potential to profit from her persona, she would not have suffered "an objectively ascertainable economic loss from the portrayal [by the defendant]"[205] and there would be nothing of value for the right of publicity to protect. This view is supported by the cultural analysis of how the audience-consumer relates to the bundle of meanings that the celebrity signifies. In cultural studies, the celebrity personality is seen to be a cultural symbol replete with meanings for the audience. According to Marshall and many other cultural studies scholars in this area, the "celebrity" is a sign that represents well-known individuals who are often skilled in the differentiation of their personalities to intensify their "well-knownness."[206] This sign acquires a protectable market value as an economic commodity *because* of the meanings that audiences vest in them and *because* of the consumption behavior of the audiences that respond to them.[207] The audience-consumer who identifies a particular celebrity that he or she likes will naturally gravitate towards products with which that celebrity is associated. It does not matter whether this favorable recognition is triggered through a name, likeness, or some other visual or auditory cue.

In his seminal analysis of consumer responses to celebrity endorsements, Grant McCracken observes that "when consumers respond to [a celebrity's] 'attractiveness,' they are, in fact, responding to a very particular set of meanings. They are identifying with a bundle of sym-

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[203] *E.g.*, Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974); Tellado v. Time-Life Books, Inc., 643 F. Supp. 904, 909 (D.N.J. 1986); Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 792 (Ct. App. 1993); Onassis v. Christian Dior-N.Y, Inc., 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095 (App. Div. 1985). Generally, it appears that the level of the plaintiff's fame goes only to the amount of damages, not to the very existence of a right. According to the Ninth Circuit, "'[w]ell known' is a relative term, and differences in the extent of celebrity are adequately reflected in the amount of damages recoverable." Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1102 (9th Cir. 1992). *See also* McCarthy's observations on why "non-celebrities" may not bring right of publicity claims at all. MCCARTHY, *supra* note 11, § 4:20.

[204] *E.g.*, Pesina v. Midway Mfg. Co., 948 F. Supp. 40, 42 (N.D. Ill. 1996); DeClemente v. Columbia Pictures Indus., Inc., 860 F. Supp. 30, 53 (E.D.N.Y. 1994); Cox v. Hatch, 761 P.2d 556, 564 (Utah 1988).

[205] Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1613 (1979).

[206] *E.g.*, BOORSTIN, *supra* note 149, at 65.

[207] "Stars are examples of the way people live their relation to production in capitalist society." RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETIES 5 (2d ed. 2004). *See also id.* at 16-17; TURNER, UNDERSTANDING CELEBRITY, *supra* note 152, at 89-127.

bolic properties . . . . Celebrities have particular configurations of meanings that cannot be found elsewhere."[208]

The right of publicity as understood by the Ninth Circuit in a number of cases implicitly recognizes that an unauthorized use of a celebrity identity in a commercial context has the effect of enhancing consumption values of a product with which the celebrity personality is associated.[209] Legal commentator George Armstrong also postulated that

> [t]he saturation of the airwaves with celebrity performances increases public awareness of the dramatic style, mannerisms, intonation or voice of a star. Public recognition of these additional features of the persona permits advertisers to imitate these traits . . . to achieve the same or greater promotional benefit than they would obtain by using the celebrity's name or likeness.[210]

When used in a commercial context like in advertising or merchandising, *all* uses of identity are calculated to capitalize on the affective relationship between the celebrity and the consumer;[211] these uses succeed in doing so when they *evoke* the celebrity in the minds of the audience.

If the identity of the celebrity was not evoked in the minds of the audience – regardless of whether it was through name, likeness, voice or other indicia – using a particular referencing device in an advertisement would have been pointless. The celebrity plaintiffs in cases like *Midler*, *Waits*, *Onassis*, and *Lombardo* have all refused to be featured in the defendants' advertisements. Regardless, the defendants in each case then proceeded to recreate specific distinctive characteristics of the celebrities in question for the advertisements. Ford and Frito-Lay, through their advertising agencies, found a soundalike to imitate the voices of Bette Midler and Tom Waits, respectively. Christian Dior intentionally dressed a lookalike to evoke Jacqueline Kennedy-Onassis' persona. Doyle, Dane & Bernbach designed an elaborate New Year's Eve setting to capture the performing style of Guy Lombardo. If the plaintiffs were indeed well-known from their circulation in the media, then the public

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[208] Grant McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 J. CONSUMER RES. 310, 312-15 (1989). Celebrities draw on these powerful meanings from the "roles" they assume in their movie, television, sporting or other careers. According to the McCracken approach, whether one plays a character in a movie or plays football in the sporting arena, the celebrity is in fact fulfilling a cultural role which contains a configuration of meanings to the public audience. "It is the accumulated meanings of celebrities that make them so potent a source of significance." *Id.* at 316.

[209] *E.g.*, Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 414 (9th Cir. 1996); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992); White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395 (9th Cir. 1992); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[210] George M. Armstrong Jr., *The Reification of Celebrity: Persons as Property*, 51 LA. L. REV. 443, 465 (1991).

[211] Shekhar Misra & Sharon E. Beatty, *Celebrity Spokesperson and Brand Congruence: An Assessment of Recall and Affect*, 21 J. BUS. RES. 159, 170 (1990). *See also* PRINGLE, *supra* note 183, at 101.

should have no problem identifying them from these portrayals in the advertisement. It would be premature for courts to dismiss the claims summarily and not put the issue of identifiability to the jury.

This section argues that *all* forms of identification are through evocation – namely, that a celebrity is called to mind as a result of the audience's visual or auditory cognition – and therefore there is no need to artificially create different categories of actionable indicia. Thus, the relevant inquiry for identifiability ought to be: *Is the plaintiff reasonably and readily identifiable by a more than de minimis number of people from the total context of the defendant's use?*[212] This threshold question of evocative identification covers the uses of all indicia of identity. The more well-known a plaintiff, the more commercially valuable her identity will be, and the more readily she will be identified from a particular use. If the answer to the question is in the affirmative, the court should proceed to the next element of the claim, and ask whether the associative value of the plaintiff's identity has been appropriated by the defendant. If the answer is in the negative, then judgment should be awarded to the defendant.

1. Name

In the "name" cases discussed in Part II.A, the use of the name of a well-known celebrity clearly calls to mind the particular individual. Generally, when a name is used, it is obvious from the decisions that the courts engage in an assessment of the level of "well-knownness" of the plaintiff when determining whether the name was used as a symbol of the plaintiff's celebrity identity. It is implicit in numerous cases that the plaintiff was evoked in the minds of the audience and was reasonably and readily identified by the public from the defendant's use. In *TCI Cablevision*, where a famous hockey player's nickname "Tony Twist" was used for a comic character that bore no resemblance to him, the court found it significant that he was "immensely popular with hometown fans" and "hosted the 'Tony Twist' television talk show for nearly two years."[213] In *Hirsch*, the court found the plaintiff's nickname "Crazylegs" to be well-known as he was "a sports figure of national prominence,"[214] referring to his outstanding professional football track record and numerous appearances in advertisements using the moniker "Crazy-

[212] This test borrows from the "de minimis" concept proposed by McCarthy and its evocative standard of review is supported by comments from various commentators and state courts. *See* MCCARTHY, *supra* note 11, §§ 3:7, 3:17-3:22; *see also* Schlachter, *supra* note 136, at 477; Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 866 (1995); Lapter, *supra* note 42, at 320-21; Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 595 (N.D. Tex. 1999); Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998); McFarland v. Miller, 14 F.3d 912, 923 (3d Cir. 1994).

[213] Doe v. TCI Cablevision, 110 S.W.3d 363, 366 (Mo. 2003).

[214] Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 131 (Wis. 1979).

legs."[215] In *Ali*, the court noted that Ali's efforts to identify himself in the public mind as "the Greatest" have been so successful that he was regularly identified as such in the news media, even on the cover of *Time* magazine.[216] However in cases like *Pesina* and *DeClemente*, where the plaintiffs were not well-known individuals, the courts properly denied recovery.[217]

2. Likeness

In the "likeness" cases highlighted in Part II.B, it is clear that current case law generally requires the plaintiff to be "readily identified" by the audience from a visual representation. A visual perception of a physical attribute, especially the facial features, is the most straightforward way of evoking or calling to mind the identity of a well-known individual. The courts have acknowledged this in the lookalike cases of *Onassis* and *Allen*, the cases featuring drawings of celebrities like *Ali* and *Comedy III*, and the cases involving photographs of the plaintiffs taken many years ago like *Negri* and *Downing*.[218]

3. Evocative Aspects of Identity

In the "evocative aspects of identity" cases examined in Part III.C, it emerged that a number of state and circuit courts are willing to extend protection from the traditional criteria of name and likeness to any indicia of identity that evoked a well-known plaintiff. Although a mere reminder of the celebrity will not satisfy the identification requirement, it is currently unclear just how one can confidently distinguish between mere non-actionable reminder and actionable evocation.[219] However, the suggestion by a commentator, that the solution lies in the distinction between protectable permanent and non-protectable transitory aspects, is untenable.[220] While one may agree that "transitory adjuncts of personality . . . [such as] hairstyle [or] wardrobe . . . *standing alone*, are of such dubious originality and confounding subtlety as to be undeserving of independent legal existence,"[221] an overarching approach to identification through evocation obviates the need for any pre-determined set of actionable indicia. As explained earlier,

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[215] *Id.* at 131-32.
[216] Ali v. Playgirl, Inc., 447 F. Supp. 723, 727 n.8 (S.D.N.Y. 1978).
[217] *See supra* notes 163-165 and accompanying discussion.
[218] Negri v. Schering Corp., 333 F. Supp. 101, 104 (S.D.N.Y. 1971); Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001).
[219] *E.g.*, MCCARTHY, *supra* note 11, § 4:86; McCarthy, *supra* note 10, at 136-38; Halpern, *supra* note 212, at 866; Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counterpoints to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 601-03 (1996); White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395, 1405 (9th Cir. 1992).
[220] William M. Heberer III, *The Overprotection of Celebrity: A Comment on* White v. Samsung Elec. Am., Inc., 22 HOFSTRA L. REV. 729, 738-43 (1994).
[221] *Id.* at 740 (emphasis added) (quoting H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 44-45 (1992)).

this approach takes cognizance of the prior knowledge of the audience of all the defining symbols, characteristics or attributes of a well-known individual at a particular point in time and appropriately allows the jury to determine whether the plaintiff was indeed reasonably and readily identifiable from the context of the defendant's use.

The "voice" cases are similar to the "name" and "likeness" cases in that the voice as an aural sign triggers the audience's recognition of a famous plaintiff in the same way a linguistic sign and a visual sign can evoke the plaintiff. Members of the jury who are supposed to represent ordinary viewers and listeners should be able to recall a particular plaintiff from the defendant's use; if indeed there exists a distinctive voice that is not widely known, then it probably does not have a commercial value worth protecting. When confronted with sound recordings in a right of publicity claim, courts should ask the simple question of whether the plaintiff is "reasonably and readily identified" by the defendant's use and allow the jury to rely on their prior knowledge of the plaintiff's voice to make such a factual determination.[222]

Regarding the "role or characterization" cases, the *McFarland* court's "inextricably identified" test is the correct approach to determining whether the defendant's use of a fictional character evoked the actor-plaintiff in the minds of the audience. As Part II.C showed, the plaintiff has to be widely known to the public as an individual whose claim to fame is inextricably identified with the character she has created or played. Where a popular historical or literary character is involved, like Count Dracula in *Lugosi* and the Batman and Tarzan examples discussed,[223] the courts are less likely to find that an actor's right of publicity has been infringed. Although the proposed controlling requirement that the plaintiff be reasonably and readily identified from the defendant's use does not change, however, for the reasons enunciated by the Third and Sixth Circuits,[224] a further requirement of "inextricably identified" ought to be imposed for characterization cases so that the right of publicity is not construed to give a celebrity total control over a particular genre of roles.[225] Courts should therefore properly direct juries to determine whether a celebrity has become so inextricably identified with a role or character, both on film and television, such that her human persona would be invoked by the particular role or character.[226]

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[222] This would bring "voice" cases in line with "likeness" cases. *See, e.g.*, Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998).
[223] *See supra* notes 107-109 and accompanying text.
[224] *See supra* notes 95-101 and accompanying text.
[225] *See also* White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395, 1405 (9th Cir. 1992) (Alarcon, J., dissenting); White v. Samsung Elec. Am. (*White II*), 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, J., dissenting). *Contra* Wendt v. Host Int'l, Inc. (*Wendt I*), 125 F.3d 806, 811 (9th Cir. 1997) ("[A]n actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character.").
[226] *E.g.*, *McFarland*, 14 F.3d at 921 ("We hold only that there exists at least a triable issue of fact.").

Most of the "other indicia" cases, like *Carson* and *Lombardo*, would also have found support from a cultural studies analysis and passed the muster of the proposed "reasonably and readily identified" standard. In *Carson*, the audience-consumer would be reacting to the famous phrase "Here's Johnny" in its total signification;[227] the readily identifiable phrase would be evocative of the widely known television personality Johnny Carson who had been introduced on *The Tonight Show* with the distinctive phrase since 1962.[228] The celebrity personality of Johnny Carson, as the Sixth Circuit rightly points out, would not be evoked by his real name, but by the distinctive introductory slogan.[229] When consumers are attracted to products associated with Carson, they are in fact responding to the affective meanings signified by Carson. In a similar manner, Guy Lombardo, a popular entertainer who has spent forty years performing as "Mr New Year's Eve," ought to be reasonably and readily identified by an audience when "the defendants utilized the services of an actor conducting a band and provided him with the same gestures, musical beat and choice of music . . . with which plaintiff had been associated in the public's mind for several decades."[230]

Finally, in *White*, it is indisputable that Vanna White is the quintessential contemporary celebrity whom Boorstin would have described as "a person who is known for [her] well-knownness [sic]."[231] She is not known for any particular acting, sporting, artistic, literary, or intellectual abilities; nor is she known for any heroic endeavor. Yet, White has been seen by forty million people on television daily.[232] But contrary to the view of the Ninth Circuit majority, and despite the defendant's reference to the advertisement as the "Vanna White ad,"[233] the advertisement may arguably be evocative of the *Wheel of Fortune* show and *not* Vanna White the celebrity. Unlike *Carson* and *Midler*, where the distinctive catch phrase and the voice of the soundalike were evocative of the celebrity individuals Johnny Carson and Bette Midler, the elements in the Samsung advertisement were arguably evocative of a popular television program on which White performed a particular role. Judge Alarcon, in his dissent, pointed out that White possesses the "common attributes" of "an attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry" which are "evident among game-show hostesses, models . . . and other women in the entertainment

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[227] BAUDRILLARD, *supra* note 178, at 27.
[228] *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983).
[229] In dissent, Justice Kennedy thought the phrase was "merely associated" with Carson and not sufficiently distinctive. *Id.* at 840. *See also* Pesce, *supra* note 28, at 801-03.
[230] Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 665 (App. Div. 1977).
[231] BOORSTIN, *supra* note 149.
[232] White v. Samsung Elec. Am. Inc. (*White I*), 971 F.2d 1395, 1396 (9th Cir. 1992).
[233] *See id.*

field."[234] However, if the advertisement was indeed evocative of White – as White may be reasonably and readily identified by a more than de minimis number of people from the total context of Samsung's advertisement – since she was playing a role on the *Wheel of Fortune* show, the next question that the court should address is whether White was "inextricably identified" with the role of a blond hostess in a long gown with fine jewelry.[235] Similarly, in *Wendt*, rather than dodging the question, the Ninth Circuit should have considered the application of the "inextricably identified" test to determine whether the personae of Wendt and Ratzenberger were inseparable from their *Cheers* characters.[236]

As Judge Kozinski pointed out in his impassioned dissent where an application for en banc hearing was rejected, "[i]t's the 'Wheel of Fortune' set, not the robot's face or dress or jewelry that evokes White's image . . . White [is given] an exclusive right not in what she looks like or who she is, but in what she does for a living."[237] Indeed, the concern that "every famous person now has an exclusive right to *anything that reminds the viewer of her [or him],*"[238] has resulted in Sixth and Tenth Circuits refusing to follow *White*.[239]

CONCLUSION

Increasingly, it seems that any readily recognizable characteristic of a celebrity is likely to be construed by the courts to possess a pecuniary value by which an unauthorized appropriation is actionable under the common law right of publicity. One of the most interesting aspects of celebrity is the intensifying degree to which the celebrity has been incorporated into our daily lives, as illustrated in Part III.A. As Turner points out, the individual celebrity has "a highly identifiable, even iconic, physical image, a specific history for the circulation of this image, and accrues psychological and semiotic depth over time."[240] The cul-

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[234] *Id.* at 1405 (Alarcon, J., dissenting).

[235] McFarland v. Miller, 14 F.3d 912, 920 (3d Cir. 1994). Although *McFarland* was decided after *White*, there were ample authorities on a distinction between performer and role when considering identifiability of the plaintiff from the defendant's use, but the majority made no reference to these cases.

[236] The Ninth Circuit held that it was a "likeness" issue with regard to identifiability that was to be determined. *See* Wendt v. Host Int'l, Inc. (*Wendt I*), 125 F.3d 806, 810 (9th Cir. 1997).

[237] White v. Samsung Elec. Am. (*White II*), 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, J., dissenting). *See also White I*, 971 F.2d at 1405 (Alarcon, J., dissenting) ("The Wheel of Fortune set, however, is not an attribute of Vanna White's identity. It is an identifying characteristic of a game show.").

[238] *White II*, 989 F.2d at 1515 (Kozinski, J., dissenting) (emphasis in original). *See also* Halpern, *supra* note 212, at 866.

[239] *See e.g.*, Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 626 (6th Cir. 2000); ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 936 (6th Cir. 2003); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 970 (10th Cir. 1996).

[240] TURNER, UNDERSTANDING CELEBRITY, *supra* note 152 at 37. *See also* RICHARD DECORDOVA, PICTURE PERSONALITIES: THE EMERGENCE OF THE STAR SYSTEM IN AMERICA 9 (1990).

tural and social pervasiveness of the celebrity suggest that members of the public can identify a particular celebrity by more than just a mention of the celebrity's name or a photograph of the celebrity in a newspaper. Moreover, Marshall's study of entertainment celebrities has shown that "[e]ach industry produces a range of celebrity types that not only are constructed to have distinctive qualities when compared with other celebrities within that industry, but are differentiated from the production of celebrities in each of the *other* domains of the entertainment industry."[241] These distinctive qualities may be "a complex configuration of visual, verbal and aural signs."[242]

Insofar as the cases hold that a celebrity may be identified by any attribute or a combination of elements beyond name and likeness, they are supportable by observations and research in cultural studies on the contemporary celebrity. Since audiences relate to the celebrity in all its significations, there is no need to categorize different actionable indicia of identity as all forms of identification are by their very nature "evocative," albeit to different degrees. If some limits are to be imposed on an expanding right of publicity, a restrictive reading of identity is not the appropriate manner to do so. On the contrary, the First Amendment defense provides a robust constraint on the right of publicity, particularly when construing a wider range of uses of the celebrity identity to be protectable as political speech that contribute to democratic deliberation and debate.

Judges and scholars have been unduly concerned about evocation as a separate category of indicia of identity. Identifiability of a plaintiff through evocation outside of name and likeness does not equate to liability in a right of publicity action. Evocative identification in right of publicity doctrine is unequivocally supported by cultural practices of identity formation and commodity consumption. The brouhaha surrounding *White* is really much ado about nothing.

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[241] MARSHALL, *supra* note 154, at 186. Marshall's seminal work outlines how the film, television and pop music industries have organized their production of celebrities around particular characteristics.

[242] DYER, *supra* note 207, at 38.