

# RIGHT OF PUBLICITY IN THE ERA OF CELEBRITY:

*A Conceptual Exploration of the California Right of Publicity, as Expanded in White v. Samsung Electronics, in Today's World of Celebrity Glorification and Imitation*

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## I. INTRODUCTION/BACKGROUND

Today's American adults spend more time interfacing with media than ever before.<sup>1</sup> An average American adult spends more than eleven hours per day interacting with media, with just shy of four hours spent on a computer, tablet, or smartphone.<sup>2</sup> Young adults between the ages of eighteen and thirty-four spend 43 percent of their time digitally consuming media.<sup>3</sup> Today, over 78 percent of the U.S. population has at least one social networking profile, and a substantial portion of media consumed by

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<sup>1</sup> Quentin Fottrell, *People Spend Most of Their Waking Hours Staring at Screens*, MARKET WATCH (Aug. 4, 2018, 5:09 PM ET), <https://www.marketwatch.com/story/people-are-spending-most-of-their-waking-hours-staring-at-screens-2018-08-01>.

<sup>2</sup> *Id.*

<sup>3</sup> *Time Flies: U.S. Adults Now Spend Nearly Half a Day Interacting with Media*, NIELSEN (July 31, 2018), <https://www.nielsen.com/us/en/insights/news/2018/time-flies-us-adults-now-spend-nearly-half-a-day-interacting-with-media.print.html>.

adults and young adults is social media, averaging about forty-five minutes per day spent on social networking for adults eighteen years old and older.<sup>4</sup>

Bred from this uptick in media consumption and broadening social networks is the rise of celebrity and social media influencers. Celebrities like Beyoncé, Ariana Grande, and Kylie Jenner, each with several million followers on popular social media platforms like Instagram and Twitter, have maximized social media to interact with fans and boost their personal brand.<sup>5</sup> Unlike celebrities with a preexisting fan base, other individuals, dubbed ‘social media influencers,’ have taken to social media to create and capitalize on a purely digital personal brand that gradually expands to the level of celebrity.<sup>6</sup> Much like their title suggests, social media influencers, and celebrities alike, are paid to influence their audience.<sup>7</sup> This can take the form of sponsored posts, advertisements, brand outreach, and general partnerships with businesses all intended to capitalize on the growing popularity of the celebrity or influencer themselves in addition to their particular brand or image.<sup>8</sup>

However, studies have shown that the influence of social media influencers and celebrities has more than a commercial impact. A study by the YMCA interviewed over 1,000 individuals between the ages of eleven and sixteen, finding that 58 percent identified celebrities, and 52 percent identified social media, as the source of their body image expectations.<sup>9</sup> Moreover, 62 percent of fifteen- to sixteen-year-olds, and 43 percent of eleven- to twelve-year-olds, identified individuals on social media as a source of

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<sup>4</sup> *Id.*

<sup>5</sup> Karla Rodriguez, *The Most Influential Celebrities on Social Media*, US MAGAZINE (Oct. 20, 2017), <https://www.usmagazine.com/celebrity-news/pictures/the-most-influential-celebrities-on-social-media/ariana-grande-2>.

<sup>6</sup> The Digital Marketing Institute defines ‘social media influencers’ as “a user who has established credibility in a specific industry, has access to a huge audience and can persuade others to act based on their recommendations.” Carla Rivera, *9 of the Biggest Social Media Influencers on Instagram*, DIGITAL MARKETING INSTITUTE, <https://digitalmarketinginstitute.com/en-us/blog/9-of-the-biggest-social-media-influencers-on-instagram> (last visited Apr. 21, 2019).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Young People Face Great Expectations to Look Perfect*, YMCA (Jul. 23, 2018), <https://www.ymca.org.uk/latest-news/young-people-face-great-expectations-to-look-perfect>.

pressure about their physical appearance.<sup>10</sup> A second study published in the *Journal of Social Media and Society* found that body image dissatisfactions in adolescents “have largely been attributed to the frequent depictions of unrealistic body images in the mass media . . . made more pervasive in social network sites . . . such as Facebook, Twitter, or Instagram.”<sup>11</sup> The influence and pervasiveness of media has rewired youth consumer expectations of normative beauty standards to be those embodied by celebrities and influencers. Young consumers with such expectations are implicitly, and sometime explicitly, encouraged to mirror the appearance of celebrities as a means of fitting in or being accepted socially.

However, while adolescents may be seemingly more impressionable, the impact of celebrity on body image is not limited to the youth. Adults also experience body dissatisfaction spurred on by media portrayals of “unrealistic [body image] ideals.”<sup>12</sup> This dissatisfaction results in behavior modifications like dieting and plastic surgery. Recent studies show that around forty-five million Americans diet each year, and that around \$33 billion is spent on weight loss products in the United States each year.<sup>13</sup> Internationally, there has been growing use of anabolic steroids and in 2014, over twenty million cosmetic procedures were performed worldwide.<sup>14</sup> In this way, adult consumers of media also feel a pressure to adapt their appearance to normative beauty standards set by celebrities and influencers.

In fact, some individuals go so far as to utilize plastic surgery to attempt to imitate the appearance of celebrities and influencers they see in media.<sup>15</sup> Celebrity imitation plastic surgery has become a pervasive trend,

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<sup>10</sup> *Id.*

<sup>11</sup> Shirley S. Ho et al., *Social Network Sites, Friends, and Celebrities: The Roles of Social Comparison and Celebrity Involvement in Adolescents' Body Image Dissatisfaction*, 1 *SOCIAL MEDIA + SOCIETY* 11, 1 (2016), <https://journals.sagepub.com/doi/pdf/10.1177/2056305116664216>.

<sup>12</sup> SARAH GROGAN, *BODY IMAGE: UNDERSTANDING BODY DISSATISFACTION IN MEN, WOMEN AND CHILDREN* xi (3d ed. 2017).

<sup>13</sup> *Id.* at xi.

<sup>14</sup> *Id.* at xi.

<sup>15</sup> For example, Jennifer Pamplona spent over \$500,000 on around thirty plastic surgeries to resemble Kim Kardashian; Celebrity impersonator, Miki Jay, spent over \$16,000 to look more like Michael Jackson; Celebrity impersonator Donna Marie Trego spent \$60,000 to look more like Lady Gaga; and social media influencer, Justin Jedlica underwent over 300 cosmetic procedures to resemble a Ken doll. Elizabeth

with potential patients often making requests to look like a specific celebrity or to model particular bodily attributes after celebrity body parts.<sup>16</sup> Moreover, individuals who undergo plastic surgery to resemble particular celebrities often do so to further their careers in the arts and entertainment industry, wherein they are able to capitalize on their imitation of a particular celebrity's image.<sup>17</sup> This trend of celebrity imitation surgeries exists alongside the long-standing trend of celebrity imitation within the arts and entertainment industries, with some individuals making as much as \$438,000 per year to impersonate celebrities.<sup>18</sup> As a result, there is a considerable financial incentive to receive imitation surgeries or capitalize on one's natural resemblance to a particular celebrity and subsequently commercialize and market that resemblance.

This celebrity imitation market may seem to have a limited impact, reflecting only the singular, autonomous choice of a specific individual. However, legislation and jurisprudence surrounding the right of publicity suggests that receiving plastic surgery or commercializing one's resemblance to a particular celebrity may be a legal liability, and that claims brought by celebrities against celebrity imitation surgery recipients and celebrity look-alikes to preserve exclusivity over the celebrity's image may be meritorious.

The ability to assert exclusivity over a celebrity's image has risen in tandem with the rise of social media and the marketability of celebrity image and branding. This assertion of rights was bolstered by the Ninth

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Narins, *What Happens when People Stop Wanting to Look like Kardashians?*, COSMOPOLITAN MAGAZINE (Nov. 16, 2018), <https://www.cosmopolitan.com/health-fitness/a23323882/plastic-surgery-trends-kardashian>; *Plastic Surgery to Look like a Celebrity — What's That About?*, DR. TIM R. LOVE M.D. FACTS BLOG, <https://drtimlove.com/blog/plastic-surgery-to-look-like-a-celebrity-whats-that-about> (last visited April 21, 2019); William Buckingham, *This Lot Spent £250,000 to "Look" like Celebrities*, THE SUN (Apr. 5, 2016, 8:46 PM), <https://www.thesun.co.uk/archives/news/245819/this-lot-spent-250000-to-look-like-celebrities>.

<sup>16</sup> *Celebrity Plastic Surgery: 8 People Who Have Had Extreme Operations to Look like Their Favorite Stars*, HUFFPOST (Dec. 6, 2017), [https://www.huffingtonpost.com/2013/10/24/celebrity-plastic-surgery\\_n\\_4151715.html](https://www.huffingtonpost.com/2013/10/24/celebrity-plastic-surgery_n_4151715.html).

<sup>17</sup> *Id.*

<sup>18</sup> Claire Gordon, *This Woman Has Raked in Nearly \$500K by Impersonating Britney Spears*, BUSINESS INSIDER (Jan. 22, 2013, 6:09 PM), <https://www.businessinsider.com/huge-earnings-for-celebrity-look-alikes-2012-12>.

Circuit's broad recognition of the right of publicity in *White v. Samsung Electronics*. The court in *White v. Samsung Electronics* reasoned that such a broad publicity right would fuel investment in celebrity image promotion while simultaneously protecting the investment itself.

However, this reasoning has generated a paradox wherein the very promotion of celebrity which undergirds unhealthy body image and incentivizes subsequent unhealthy body modification simultaneously limits the copying of a celebrity's image through the enforcement of a celebrity's right of publicity. In other words, the promotion of celebrity protected by the *Samsung* right of publicity simultaneously incentivizes and bars individuals from coopting a celebrity's image. This article explores this paradox, and other downstream consequences of the *White v. Samsung Electronics* construction of the right of publicity, starting with a discussion of the right of publicity and its expansion in *White v. Samsung Electronics* and then applying this broad right to the current celebrity image market supercharged by the ever-increasing consumption of media.

#### A. RIGHT OF PUBLICITY

The right of publicity arose out of a recognition of commercial exploitation of celebrities that accompanied technological advances in photography, movies, and radio in the 19th century.<sup>19</sup> As technology advanced, the methods and means of unauthorized uses of celebrities' images became more accessible and prevalent.<sup>20</sup> While resistant at first, courts eventually acknowledged the prevalence of these unauthorized uses and the accompanying inability of celebrities to control the commercial use of their image.<sup>21</sup> Gradually, the courts formed a common law right of publicity generally defined as the right to control commercial uses of one's identity.<sup>22</sup>

Some of the justifications for right-of-publicity legislation are analogous to other intellectual property rights, including the prevention of

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<sup>19</sup> Reshma Amin, *A Comparative Analysis of California's Right of Publicity and the United Kingdom's Approach to the Protection of Celebrities: Where Are They Better Protected?*, 1 CASE W. RES. J.L. TECH. & INTERNET 93, 97 (2010).

<sup>20</sup> *Id.* at 99.

<sup>21</sup> *Id.* at 99.

<sup>22</sup> Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Apr. 21, 2019).

unjust rewards.<sup>23</sup> However, the right of publicity is a stand-alone intellectual property right with its own justifications independent of other intellectual property rights, like trademark or copyright.

One of the primary justifications for right of publicity is a recognition of the time and effort it takes to cultivate a personal brand and image that can be marketed and profited from.<sup>24</sup> Essentially, “a famous person who has ‘long and laboriously nurtured the fruit of publicity values’ should benefit from those values herself . . . [S]ince the celebrity spends time, money, and energy in developing a commercially lucrative persona, that persona is the fruit of the celebrity’s labor and entitles her to its rewards.”<sup>25</sup> Advertisers who appropriate celebrity personas are often conceptualized as having impermissibly reaped what the celebrity has sown.<sup>26</sup> The idea is that it would be unfair for a business to profit from the efforts a celebrity has put into their own image and brand, without crediting or compensating that celebrity.<sup>27</sup>

A second justification for the right of publicity is an economic incentive justification which “holds that protection of the celebrity’s economic interest in her identity fosters creativity . . . [in that] assurance that the celebrity will be able to gain from what she produces will encourage artistic creation that enriches our culture.”<sup>28</sup> In other words, without exclusivity over her image, a celebrity will be discouraged from further artistic creation that fosters popular cultural enrichment.

A final related justification for the right of publicity is protecting celebrities’ creative and commercial control over the brand they built for themselves, and maintaining celebrities’ abilities to choose whether and how to be commercialized at all.<sup>29</sup> This justification operates on the premise that celebrities “should have exclusive control of [their] right of publicity

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Sudakshina Sen, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 740 (1995).

<sup>26</sup> *Id.*

<sup>27</sup> Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Apr. 21, 2019).

<sup>28</sup> Sen, *Fluency of the Flesh* at 740.

<sup>29</sup> Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Apr. 21, 2019).

in order to protect consumers from possible misrepresentation, deception and false advertising.”<sup>30</sup> Thus, not only should a celebrity have exclusivity over her appearance itself but also over whether and how she chooses to commercialize that appearance. As the U.S. Sixth Circuit Court of Appeals noted in their 1982 decision in *Carson v. Here’s Johnny Portable Toilets*, an oft-cited right of publicity case, “[t]he right of publicity has developed to protect the commercial interest of celebrities and their identities. The theory of the right is that a celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.”<sup>31</sup>

## B. CALIFORNIA STATUTORY AND COMMON LAW RIGHT OF PUBLICITY<sup>32</sup>

In California, there is both a statutory and common law right of publicity, though the statutory right of publicity is less expansive than its common law counterpart. The common law right of publicity bars appropriation of a celebrity’s name, likeness, voice, signature, identity, and persona, whereas the statutory right of publicity is limited to name, likeness, voice, and signature.<sup>33</sup>

Moreover, the common law right of publicity does not have an intent requirement, as the statutory right of publicity does.<sup>34</sup> Mistaken or inadvertent appropriation of a celebrity’s identity, name, or likeness does not provide a

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<sup>30</sup> Sudakshina Sen, *Fluency of the Flesh: Perils of an Expanding right of publicity*, 59 ALB. L. REV. 739, 741 (1995).

<sup>31</sup> *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831, 835 (6th Cir. 1983).

<sup>32</sup> This paper is limited to a discussion of California’s right of publicity. This is because (1) there is no federal or uniform right of publicity statute, so it is impracticable and unnecessary for the aims of the paper to consider all fifty states’ iterations of right of publicity legislation; (2) the central focus of the paper is on celebrities and social media influencers, of which there is a large concentration in California; and (3) the case this paper jumps off from, *White v. Samsung Electronics*, was a claim brought in California. This paper is also limited in scope to the common law right of publicity, rather than the statutory right of publicity because the common law right is much broader and grants celebrities the leeway which this paper seeks to argue against.

<sup>33</sup> Reshma Amin, *A Comparative Analysis of California’s Right of Publicity and the United Kingdom’s Approach to the Protection of Celebrities: Where are they Better Protected?*, 1 CASE W. RES. J.L. TECH. & INTERNET 93, 103 (2010).

<sup>34</sup> *Id.* at 103.

valid defense against a common law right of publicity claim.<sup>35</sup> Finally, the common law right of publicity is ambiguous in regard to whether it requires the appropriation to be commercial. The “common law [right of publicity] stipulates that appropriation of one’s identity is actionable if it is done ‘commercially, or otherwise,’” but the courts have not yet defined which appropriations may fall under the category of ‘otherwise.’<sup>36</sup> Much like the justifications for the right of publicity outside of California, the justification for such a broad common law right of publicity in California is that celebrities depend on their image, and their ability to maintain exclusivity over that image to make a living, and thus should receive expansive protection over the commercial and creative interests undergirding that image.<sup>37</sup>

However, this broad protection over celebrities’ commercial and creative interests which spurred the inclusion of identity and persona in the California common law right of publicity was not established until the Ninth Circuit’s 1992 decision in *White v. Samsung Electronics*. The court’s decision in *White v. Samsung Electronics* broadened a celebrity’s right of publicity beyond name and likeness, granting celebrities exclusivity as to their general appearance. This exclusivity generates a meritorious legal channel through which celebrities may be able to police the appearance of individuals who profit from their resemblance to a particular celebrity.

## II. *WHITE v. SAMSUNG ELECTRONICS*

In 1992, Vanna White of the popular TV game show *Wheel of Fortune*, sued Samsung Electronics under California Civil Code Sec. 3344, California common law right of publicity, and the Lanham Act over a series of Samsung advertisements.<sup>38</sup> The advertisements were set in the twenty-first century, and featured a futuristic version of a contemporaneous piece of popular culture and a Samsung product.<sup>39</sup> The ad at the center of White’s suit, referred to internally as the ‘Vanna White Ad,’ featured a robot

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<sup>35</sup> *Id.* at 104.

<sup>36</sup> Under the California common law right of publicity, the second factor a plaintiff must prove in a right of publicity claim is “the appropriation of the plaintiff’s name or likeness to the defendant’s advantage, commercially or otherwise . . .” *Id.* at 104.

<sup>37</sup> *Id.* at 104.

<sup>38</sup> *White v. Samsung Electronics*, 971 F.2d 1395, 1396–97 (1992).

<sup>39</sup> *Id.* at 1396.



dressed in a wig, gown, and jewelry intended to resemble White.<sup>40</sup> The robot, mimicking White's famous pose and stance, was situated next to a Wheel of Fortune set with the caption "'Longest-running game show. 2012 A.D.'"<sup>41</sup>

In her suit, White claimed that Samsung Electronics intentionally used a robot resembling White, and did so without paying White and without White's permission.<sup>42</sup> The district court found for Samsung Electronics, rejecting each of White's claims under both California Code, California common law, and the Lanham Act.<sup>43</sup> On appeal, the Ninth Circuit court affirmed in part and reversed in part, finding that White's common law right of publicity was violated and that White was able to provide a genuine issue of material fact pertaining to her Lanham Act claim.<sup>44,45</sup>

#### A. WHITE'S COMMON LAW RIGHT OF PUBLICITY CLAIM

In California, prior to *White v. Samsung Electronics*, a successful suit under the common law right of publicity required proof of four elements: "(1) Defendant's use of Plaintiff's identity; (2) the appropriation of Plaintiff's *name or likeness* to Defendant's advantage; (3) lack of consent; and (4) resulting injury" (emphasis added).<sup>46</sup> Regarding White's claim under the California common law right of publicity, both the district court and Ninth Circuit

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<sup>40</sup> *Id.* at 1396.

<sup>41</sup> *Id.* at 1396.

<sup>42</sup> *Id.* at 1396.

<sup>43</sup> *Id.* at 1396–97.

<sup>44</sup> While White was able to move forward with her Lanham Act claim, this paper focuses on her right-of-publicity claim. White's Lanham Act claim is mentioned here for narrative consistency, not as a point of analysis.

<sup>45</sup> Section 3344 of the California Code states that "[a]ny person who knowingly uses another's name, voice, signature, photograph, or *likeness*, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling . . . without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof" (emphasis added). The district court found that Samsung's robot did not constitute White's "likeness" for the purposes of satisfying Sec. 3344, and this was affirmed on appeal by the Ninth Circuit court. *White v. Samsung Electronics*, 971 F.2d 1395, 1397 (1992).

<sup>46</sup> *California Right of Publicity Law*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/california-right-publicity-law> (last visited Apr. 21, 2019).

court held that White failed to prove that Samsung appropriated White's "name or likeness to [Samsung's] advantage."<sup>47</sup>

However, the Ninth Circuit splintered from the district court noting for the first time that "the right of publicity is not limited to the appropriation of name or likeness."<sup>48</sup> The Ninth Circuit instead took a stance that broadened the right of publicity to include "means of appropriation other than name or likeness."<sup>49</sup> The Court reasoned that "[a]lthough [Samsung] avoided the most obvious means of appropriating [White's identity], each of their actions directly implicated the commercial interests which the right of publicity is designed to protect."<sup>50</sup> In other words, despite not fitting neatly within a traditional right-of-publicity claim, the Court felt that White's commercial interests were usurped in a way that was intended to be, and ought to explicitly be, protected by the right of publicity.

By finding for White in her right-of-publicity claim despite finding that Samsung did not appropriate her name or likeness, the Court shifted focus away from the mechanism by which celebrity identity is appropriated, and instead focused on the existence of the appropriation itself.<sup>51</sup> Thus, the Court broadened the common law right of publicity to *general* appropriation of *identity*, rather than limiting the right to just name or likeness.<sup>52,53</sup>

The Court justified this finding by emphasizing that White's fame, along with the fame garnered by celebrities in general, is the product of immense effort and, thus, control of the exploitation and commercialization of this fame ought to be in the hands of the celebrity herself.<sup>54</sup> In doing so, the Court broadened, prioritized, and concretized celebrities' property

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<sup>47</sup> *White v. Samsung Electronics*, 971 F.2d 1395, 1397 (9th Cir. 1992).

<sup>48</sup> *Id.* at 1398.

<sup>49</sup> *Id.* at 1398.

<sup>50</sup> *Id.* at 1398.

<sup>51</sup> *Id.* at 1399.

<sup>52</sup> Ultimately, the case was remanded, and a jury awarded White approximately \$400,000 in damages. *Id.* at 1399.

<sup>53</sup> For ease, I will be referring to the right of publicity as it existed before *White v. Samsung Electronics* as the "pre-*Samsung*" right of publicity, and to the right of publicity as it existed after *White v. Samsung Electronics* as the "post-*Samsung* right of publicity." The pre-*Samsung* right of publicity is limited to name and likeness, whereas the post-*Samsung* right of publicity includes name, likeness, voice, signature, identity, and persona.

<sup>54</sup> *White v. Samsung Electronics*, 971 F.2d 1399, 1397 (9th Cir. 1992).

rights over their image and brand such that their image and brand can be more readily protected, promoted, and commercialized.

## B. CRITICISMS OF *WHITE v. SAMSUNG ELECTRONICS*

There has been palpable backlash due to the expansion of the right of publicity by the majority in *White v. Samsung Electronics*, including dissents by Judge Alarcon in the Ninth Circuit and by Judge Kozinski in response to a petition for a rehearing en banc. Both of these dissents provide arguments for limiting the post-*Samsung* right of publicity that have been mirrored and expanded by attorneys, lobbyists, and legal scholars alike.

### *i. Judge Alarcon's Dissent in White v. Samsung Electronics*

In *White v. Samsung Electronics*, Judge Alarcon (“Alarcon”) dissented from the majority opinion regarding White’s right-of-publicity claim, relying primarily on statutory interpretation and lack of precedence to support his conclusion. Alarcon points out that the California Legislature had the opportunity to codify the conclusion the majority ultimately reached, but chose not to.<sup>55</sup> Twenty-four years after Dean Prosser posited that the right of publicity may be expanded beyond the appropriation of just name and likeness in a law review article that the majority subsequently relied on in their decision, the California Legislature amended the statutory right of publicity to include someone’s voice or signature, in addition to name or likeness.<sup>56</sup> Alarcon concludes via *inclusion unius est exclusion alterius*, that if the California Legislature had intended to broaden the right of publicity to include a cause of action for the appropriation of another person’s identity then they would have done so at the time of amendment.<sup>57</sup>

Additionally, Alarcon posits that while the majority claims that case law has borne out that the right of publicity is not limited to name or likeness, in fact, “the courts of California have never found an infringement on the right of publicity without the use of plaintiff’s name or likeness.”<sup>58</sup> Alarcon points out that even in their own opinion, the majority relied on

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<sup>55</sup> *Id.* at 1403.

<sup>56</sup> *Id.* at 1403–4.

<sup>57</sup> *Id.* at 1404.

<sup>58</sup> *Id.* at 1403.

precedents that did not “include appropriation of identity by means other than name or likeness” as the majority eventually does.<sup>59</sup> In other words, the Court in *White v. Samsung Electronics* created a new right of publicity with no statutory or precedential basis.

Moreover, Alarcon distinguishes the cases cited by the majority in that *White* was appropriated by a robot whereas in the cases cited by the majority, the “advertisement affirmatively represented that the person depicted therein was the plaintiff.”<sup>60</sup> Alarcon interprets the appropriation targeted by the right of publicity to mean that a juror would believe that the manifestation of the appropriation is the celebrity *herself* (or the celebrity’s voice, name, etc.).<sup>61</sup> In *White*’s case, Alarcon states, “[n]o reasonable juror could confuse a metal robot with Vanna White” and thus, her identity could not have been sufficiently appropriated as required by the right of publicity.<sup>62</sup>

Finally, Alarcon distinguishes *White*’s *identity* from the *role* she plays, stating that “those things that Vanna White claims identify her are not unique to her . . . [and are], instead attributes of the *role* she plays . . . [which] do not constitute a representation of Vanna White.”<sup>63</sup> Alarcon takes the stance that the alleged appropriation is not of Vanna White, nor her specific identity, but an amalgamation of characteristics that many different individuals could embody, “especially in Southern California,” like blonde hair or a slim figure.<sup>64</sup> Alarcon posits that being famous for playing a particular role while embodying a set of characteristics is not sufficient to grant an individual a proprietary interest in that role. The majority by doing so effectively granted her, and celebrities like her, commercial exclusivity over the simultaneous presence of each of the characteristics she embodies.

Under Alarcon’s conception of the right of publicity, celebrities would be unable to prevent plastic surgery look-alikes from embodying the characteristics of the celebrity and their brand simply because a look-alike is representing a celebrity’s *role*, even if the look-alike is perceived as the

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<sup>59</sup> *Id.* at 1403.

<sup>60</sup> *Id.* at 1404–5.

<sup>61</sup> *Id.* at 1404.

<sup>62</sup> *Id.* at 1404.

<sup>63</sup> *Id.* at 1404.

<sup>64</sup> *Id.* at 1405.

celebrity herself. This conclusion depends on the distinction between identity and role. However, in the case of celebrity imitation, there may not be a clear role to play or imitate in the first place.

Vanna White's role was the hostess of *Wheel of Fortune*. In this role, she appeared in similar garb, poses, and demeanors each time she was on the show. But celebrity look-alikes and plastic surgery imitators are not limiting their imitation to a role; they are intentionally reworking their bodies to imitate the identity of the celebrities themselves, independent of any role the celebrity may or may not play. It would seem then that Alarcon's role-versus-identity analysis could not neatly apply to individuals who receive plastic surgery to imitate celebrities, or individuals who capitalize on their coincidental resemblance to a particular celebrity, in a way that would protect them from celebrity suit.

#### ii. *Kozinski's "Separate Views"*

However, even without a readily identifiable distinction between role and identity, protection available for celebrities guarding their brands and image under the right of publicity should not be unlimited. In 1993, Judge Kozinski's ("Kozinski") dissent accompanying the rejection of a petition for a rehearing en banc provides a strong policy argument for placing limits on the protections received by Vanna White and utilized by other celebrities since.<sup>65</sup>

One of the primary justifications for intellectual property is to incentivize creativity, innovation, and the exchange of ideas.<sup>66</sup> However, this protection must be balanced. Each incoming creator, inventor, and innovator depends on the innovations of the individuals who came before them. "All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy."<sup>67</sup>

The overprotection of the intellectual property rights inherent within these innovations can stifle the creative process by thwarting the additive nature of innovation. Kozinski categorizes the majority opinion in *White v. Samsung Electronics* squarely within this stifling overprotection. Under the majority's opinion, Kozinski states, "it's now a tort for advertisers to remind

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<sup>65</sup> *White v. Samsung Electronics*, 989 F.2d 1512, 1512 (Cal. Ct. App. 9th Cir. 1993).

<sup>66</sup> *Id.* at 1513.

<sup>67</sup> *Id.* at 1515.

the public of a celebrity. Not to use a celebrity's name, voice, signature, or likeness; not to imply the celebrity endorses a product; but simply to evoke a celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow."<sup>68</sup>

Kozinski laments the new right of publicity created by the majority as erasing the balance between public interest and the interests of the celebrity. He posits that the post-*Samsung* right of publicity strikes the wrong balance between exclusivity granted to the owner of the right and the maintenance of the public domain that undergirds all intellectual property law.<sup>69</sup> By favoring, and in fact expanding, White's right of publicity, the Court created a new proprietary interest which is too favorable to the celebrity and leaves too little for the public.

Kozinski takes into consideration individuals among the public who may be prevented from creating their own image and brand for fear that it too closely resembles a particular celebrity. "Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own," and in this way the public will be robbed of parody, mockery, and the ability to model oneself according to trends in appearance incidentally embodied by celebrities.<sup>70</sup> Granting Vanna White exclusivity over her persona simultaneously grants White "absolute rights to control the conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine."<sup>71</sup>

### C. DO CELEBRITIES HAVE THE RIGHT TO EXCLUDE PEOPLE FROM LOOKING LIKE THEM UNDER THE BROAD *WHITE v. SAMSUNG ELECTRONICS* CONSTRUCTION OF THE RIGHT OF PUBLICITY?

These dissents provided compelling contemporaneous arguments against broadening the right of publicity from legal, political, and innovative perspective. Still, in spite of the vehement dissent and backlash following the *White v. Samsung Electronics* decision, the broad post-*Samsung* right of publicity continues to thrive today.

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<sup>68</sup> *Id.* at 1514.

<sup>69</sup> *Id.* at 1516.

<sup>70</sup> *Id.* at 1516–17.

<sup>71</sup> *Id.* at 1517.

### *i. The Right of Exclusivity*

The Court in *White v. Samsung Electronics* found that White's right of publicity was violated in spite of the fact that neither her likeness nor name was appropriated because the Court deemed White's overall identity and general appearance to be subsumed within the right of publicity. Individuals who receive plastic surgery to look like celebrities are undoubtedly co-opting the desired celebrity's appearance, and career celebrity look-alikes are undoubtedly capitalizing on their resemblance to a particular celebrity in an analogous way. Thus, under the broad conception of right of publicity defined in *White v. Samsung*, whether the appropriation is via imitation plastic surgery or via birthright, both the look-alike and the plastic surgery recipient are appropriating the general identity of the celebrity. However, this is different from a robot, an image, a mask, or a costume. This particular appropriation comprises fundamental, physical characteristics embodied by a human being.

However, if the right of publicity as construed in *White v. Samsung Electronics* is intended to ensure that celebrities have control over the marketability of their cultivated brand, then it would seem that celebrities would have the ability to prevent celebrity look-alikes, individuals who have effectively co-opted the celebrity's image, from appearing in advertisements like the Samsung commercial or otherwise commercializing their resemblance.

In keeping with the holding of *White v. Samsung Electronics*, the right of publicity grants celebrities exclusivity over their appearance and image and thus a claim against any imitations of the celebrity's image, regardless of whether the imitation is embodied by a robot, a human being, or anything in between. Moreover, the current construction of the right of publicity grants a celebrity, just as it did White, a legal right of action to assert that exclusivity over their image.

### *ii. Kardashian v. The Gap*

In fact, celebrities are already using the post-*Samsung* right of publicity as a mechanism for policing an individual's resemblance in order to maintain and protect exclusivity over the celebrity's image.<sup>72</sup> In 2011, celebrity

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<sup>72</sup> Kim Kardashian is not the only celebrity who has sued over appropriation of identity under the post-*Samsung* right of publicity. In July 2014, Lindsay Lohan sued the

Kim Kardashian sued The Gap and Old Navy over a commercial which starred a Canadian actress resembling Kim Kardashian. The ripples of the *Samsung* decision can be seen in the complaint wherein Kardashian contextualizes her right of publicity as stemming from her status as “an internationally known celebrity . . . and pop culture icon . . . [who] has attained an extraordinary level of popularity and fame in the United States and around the world, and . . . is highly sought after to endorse commercial products and services using her name, likeness, *identity and persona*” (emphasis added).<sup>73</sup>

The complaint goes on to assert that Kim Kardashian has “invested substantial time, energy, finances and entrepreneurial effort in developing her considerable professional and commercial achievements and success, as well as in developing her popularity, fame, and prominence in the public eye.”<sup>74</sup> This reasoning aligns with the prioritization of celebrity efforts in cultivating a brand that undergirded the opinion provided by the Court in *White v. Samsung Electronics*. More overtly, the complaint continuously uses the phrase “likeness, identity and persona” when describing the proprietary right that ought to be protected under Kim Kardashian right of publicity.<sup>75</sup>

Thus, the language and arguments in the *Kardashian* complaint demonstrate how attorneys have embraced the post-*Samsung* right of publicity and are adjusting their arguments to embrace, and reap the benefits from, the broad post-*Samsung* right of publicity. In this way, this post-*Samsung* right of publicity has granted celebrities much broader exclusivity than before *Samsung* such that celebrities are now able to bring a claim against a company simply for employing an individual who resembles a particular

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makers of *Grand Theft Auto V* for featuring a character in their video game who allegedly resembled Lohan, though this was filed under the New York statutory right of publicity. Additionally, in July 2014, Panamanian dictator Manuel Noriega filed suit against Activision Blizzard, Inc. in California for appropriating his likeness in *Call of Duty: Black Ops II*. Jennifer Williams-Alvarez, *Why Celebrities like Lindsay Lohan Are Suing Video Game Studios*, ENGADGET (Nov. 18, 2014), <https://www.engadget.com/2014/11/18/gaming-likeness-lawsuit-explainer>.

<sup>73</sup> Complaint at 5, *Kardashian v. The Gap*, No. LACV11-5960 (C.D. California filed Jul. 20, 2011).

<sup>74</sup> *Id.* at 3–5.

<sup>75</sup> *Id.* at 5.



celebrity, or against an individual who otherwise commercializes their resemblance to a particular celebrity.<sup>76,77</sup>

#### D. SHOULD THE RIGHT OF PUBLICITY PROHIBIT, OR OTHERWISE CONTROL, CELEBRITY IMITATION VIA PLASTIC SURGERY OR LOOK-ALIKES?

Notably, however, this is not necessarily a desirable result. The right of publicity originally emerged in response to increased celebrity image appropriation spurred on by technological advancement. There still remains a legitimate desire to protect celebrities' exclusivity over their image and commercialization in the face of growing technological advances. However, in order to maintain exclusivity across modern technology, including advancements in plastic surgery and media production, which pervades almost all aspects of modern life today, the post-*Samsung* right of publicity must grant celebrities a more expansive propriety interest than the courts arguably could have anticipated when they established the right of publicity in the 19th century.

On the one hand, intellectual property rights like the right of publicity are intended to reward efforts expended on curating and marketing things like a celebrity's image, and intended to incentivize creativity and innovation. On the other hand, there are public policies in place which value a robust public domain and individual autonomy to make choices about one's own body.

##### *i. The Paradox*

The convergence of the post-*Samsung* right of publicity, the rise of media consumption, and the accompanying rise in celebrity imitation has created

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<sup>76</sup> This claim was settled outside of court so we do not yet know how courts would interact with, and possibly limit, the post-*Samsung* right of publicity within the celebrity imitation context. Eriq Gardner, *Kim Kardashian Settles Lawsuit Over Look-Alike in Old Navy Ad (Exclusive)*, THE HOLLYWOOD REPORTER (Aug. 29, 2012, 8:30 AM), <https://www.hollywoodreporter.com/thr-esq/kim-kardashian-settles-lawsuit-look-alike-old-navy-gap-366522>.

<sup>77</sup> Moreover, given the aforementioned remaining ambiguity regarding whether the appropriation must necessarily be commercial in order to violate a celebrity's right of publicity, and the courts' willingness to prioritize celebrity efforts, it is possible to imagine a celebrity suing an individual for appropriating a celebrity's image in a non-commercial context.

a paradox. The post-*Samsung* right of publicity further induces an already increasing rise of celebrity because it commodifies celebrities themselves, while simultaneously revealing the courts' prioritization of, and willingness to protect, a celebrity's efforts in crafting and marketing their image. This commodification and legal prioritization further instigate the already increasing proliferation of celebrity by creating financial incentives to create a profitable celebrity brand while simultaneously creating legal protections which reduce the risk of this investment. At the same time, this commodification and subsequent proliferation of celebrity is what incentivizes individuals to imitate celebrities so that they too can profit from the growing value of a celebrity's brand. In this way, the very same right that incentivizes celebrity imitation prevents individuals from acting on that incentivization as doing so would likely violate the celebrity's exclusive right of publicity.

#### *ii. Querying the Value of Celebrity in the Public Domain*

In today's entertainment industry, a celebrity's identity itself is an investment and a commodity that is arguably worth protecting because without this protection, and subsequent investment in celebrity image, celebrities are theoretically discouraged from creating their brand and, thus, from continuing to contribute to the public domain and public media. However, this argument depends on the notion that the contribution of celebrity is a public good that ought to be incentivized in the first place. Given the impact on societal conception of body image, health, and healthy behavior, it may not be taken for granted that a celebrity's branded contribution is a public good in the same way that arts, music, or invention might be. It is worth pausing to consider whether the right of publicity is still serving to incentivize contributions to the public good or whether it is merely encouraging unhealthy behaviors and simultaneously rewarding celebrities for this.

It is also worth querying the actual degree of financial impact a violation of a celebrity's right of publicity has on a particular celebrity, especially when the violating party is a smaller actor. Today, celebrities no longer rely exclusively on a particular skill or industry and often make money from a variety of industries and sponsorships. Celebrities often profit from mass business enterprises stretching from activism, investment, music, makeup, clothing, and technology, and in each of these industries they are protected by laws outside of the right of publicity, including other intellectual

property rights.<sup>78</sup> Thus, a celebrity imitator's presence in the arts and entertainment industry may have a relatively small financial impact when considered within the context of a diverse celebrity investment landscape.

### *iii. Impact on Individual Autonomy; Penalization*

Finally, the right of action created by the post-*Samsung* right of publicity has odd consequences for an individual's autonomy, financial and/or career choices, and rights over their own body. An aspiring actress who receives plastic surgery to resemble Kim Kardashian, or so happens to resemble Kardashian due to the actress' genetic makeup, becomes more marketable as Kim Kardashian, the object of the actress' imitation, grows more marketable. However, under the post-*Samsung* right of publicity, should the actress then capitalize on her growing marketability she may be penalized for allegedly appropriating Kardashian's 'likeness, image, or persona.' In this way, it becomes a legal liability for the actress to commercialize her resemblance to Kim Kardashian. Thus, an actress, or any other individual in an appearance-driven career, incurs liability simply by looking the way they do while doing their job.

This creates an anomalous penalization function of intellectual property rights wherein celebrities can use the right of publicity to police another, remote individual's appearance. Unlike other intellectual property in the form of, for example, works of art, inventions, or logos, this gives the 'owner' of the post-*Samsung* right of publicity exclusivity over their embodied appearance. Thus, the targeted liability of a post-*Samsung* right of publicity claim is not of production without a license or copying a painting, but of someone existing in their corporal form.<sup>79,80</sup>

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<sup>78</sup> Meryl Gottlieb, *15 Celebrities You Didn't Realize Own Major Business Empires*, BUSINESS INSIDER (Aug. 13, 2016, 11:08 AM), <https://www.businessinsider.com/celebrities-business-empires-2016-8#bono--elevation-partners-4>.

<sup>79</sup> This also potentially creates an odd licensing scheme where celebrities could theoretically license bodily attributes or license the ability to work as a look-alike. This type of licensing scheme would give celebrities a rather dystopian ability to profit from autonomous choices individuals make about their bodies and careers. This is not the focus of this paper, but is worth mentioning.

<sup>80</sup> Additionally, there are arguably Thirteenth Amendment considerations regarding this particular impact of the post-*Samsung* right of publicity. This, again, is not the focus of this paper but is worth mentioning.

California courts “balance interests, but usually the needs of the celebrity are given higher regard than the public and media interests at stake.”<sup>81</sup> In following this trend of celebrity prioritization by California courts, the expansion of the right of publicity in *White v. Samsung Electronics* decidedly favors celebrities and their efforts in creating and maintaining their brands. However, in doing so, the Ninth Circuit arguably went too far, creating a downstream tension between the social deification and promotion of celebrity, the legal bar to imitating celebrities, and individual autonomy.

### III. RESTRUCTURING THE RIGHT OF PUBLICITY

It is possible that the majority in *White v. Samsung Electronics* could not have foreseen how their decision would interact with the media landscape today. However, given the aforementioned paradox and anomalous penalization function, the right of publicity ought to be narrowed or adjusted to address these consequences generated by the post-*Samsung* right of publicity’s interaction with the contemporary media landscape.

#### A. RESTORING THE PRE-SAMSUNG RIGHT OF PUBLICITY

One alternative would be to narrow the right of publicity such that it does not include identity or persona. In other words, replace the post-*Samsung* right of publicity with the pre-*Samsung* right of publicity. This would address the concerns raised by Alarcon’s and Kozinski’s dissents in that celebrities would still be protected wherever their likeness, name, or voice was commercialized without their consent, but would strip celebrities of an exclusive proprietary interest in their overall appearance. In this way, a celebrity would still maintain exclusivity over the literal and tangible feature of their brand, thus preventing free-range, unadulterated, and unauthorized use of their likeness that the right of publicity was originally erected to protect against. But, this restoration of the pre-*Samsung* right of publicity would prevent celebrities from having such expansive exclusivity that

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<sup>81</sup> Reshma Amin, *A Comparative Analysis of California’s Right of Publicity and the United Kingdom’s Approach to the Protection of Celebrities: Where Are They Better Protected?*, 1 CASE W. RES. J.L. TECH. & INTERNET 93, 117 (2010).

they could prevent individuals from merely resembling them, or otherwise embodying particular, potentially recognizable attributes of the celebrity.

## B. KEEPING THE POST-*SAMSUNG* RIGHT OF PUBLICITY WITH EXCEPTIONS AND CLARIFICATIONS

If courts are reluctant to revert back to the pre-*Samsung* right of publicity, another alternative would be to maintain the post-*Samsung* right of publicity but create exceptions for appropriation by human beings, rather than by robots or other inanimate objects. This would prevent celebrities from making claims of a violation of their right of publicity wherever the embodiment of the appropriation is by a human being who intentionally received plastic surgery to resemble a particular celebrity, or otherwise capitalizes on their natural resemblance to a celebrity. In this configuration of the right of publicity, celebrities will still be able to reap the benefits of exclusivity over their identity or appearance but it would prevent them from reaching beyond protection of the celebrity's identity or appearance and into the policing of other individuals' identities or appearances.

Additionally, the remaining ambiguity over whether the post-*Samsung* right of publicity is limited to only commercial appropriation ought to be addressed. In its current configuration, the post-*Samsung* right of publicity certainly creates a right of action for celebrities to police other individuals' bodies in commercial settings, and potentially does the same in non-commercial settings. The current combination of the broad post-*Samsung* right of publicity and the ambiguity over whether it applies exclusively in commercial settings has the potential to create wide-sweeping exclusivity over all combinations of attributes resembling a particular celebrity in all settings, commercial or otherwise. This is a glaring, and bordering dystopian, power granted to celebrities that extends much farther than the original intent of the right of publicity. Courts ought to clarify this ambiguity, and in doing so ought to establish that this proposed limited post-*Samsung* right of publicity only applies in commercial settings.

## C. CONCLUSION

The right of publicity was originally established to protect a celebrity's investment and efforts to create and market their particular image or brand while simultaneously preventing unauthorized uses of a celebrity's likeness

in commercial settings. However, the right of publicity has evolved drastically since its inception. While the desire to protect and promote investment in celebrities and their contributions to the public is arguably still compelling today, they should not be assumed to be. Moreover, none of those concerns or justifications prioritizing celebrities' commercial exclusivity outweigh the potential power given to celebrities via the right of publicity as it exists today.

First, the current California common law right of publicity, as established in *White v. Samsung Electronics* — the post-*Samsung* right of publicity — furthers the prioritization and celebration of celebrity which contribute to unhealthy societal perceptions, norms, and behaviors. Second, the post-*Samsung* right of publicity creates a legal right of action which allows celebrities to prevent other human beings from resembling a particular celebrity, whether by plastic surgery or through natural resemblance, that is already being exploited by celebrities today. Finally, the broad post-*Samsung* right of publicity creates a paradox wherein individuals are simultaneously incentivized to participate in, and mirror, celebrity culture but are barred from doing so.

All intellectual property law must strike an appropriate balance between exclusivity and ownership, and allowing a free flow of creativity and ingenuity into the public domain. The right of publicity is subsumed within intellectual property law and is by no means an exception to this balance. The current configuration of the right of publicity strikes an inappropriate balance, disproportionately prioritizing celebrity exclusivity and ownership over the public. Whether by reversion to the pre-*Samsung* right of publicity or through clarifying and creating exceptions to the post-*Samsung* right of publicity, these consequences of the broad post-*Samsung* right of publicity are cause for concern, and should be addressed before they are taken to a potentially dystopian extreme.

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