

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

APPEAL NOS. 10-56400 and 10-56311

**ANNA MARIA ALBERGHETTI,
and BONNIE POINTER, on behalf of
themselves and all others similarly situated**

Plaintiffs-Appellants/Cross-Appellees,

v.

CORBIS CORPORATION,

Defendant-Appellee/Cross-Appellant.

**On Appeal from the United States
District Court for the Central District of California
Case No. 09-cv-05735-SVW**

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES BY
SCREEN ACTORS GUILD, INC. AND AMERICAN FEDERATION OF
TELEVISION & RADIO ARTISTS, AFL-CIO**

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Pursuant to Federal Rule of Appellate Procedure 29(b), Screen Actors Guild, Inc. and American Federation of Television & Radio Artists, AFL-CIO (collectively "Amici") respectfully request leave to file their concurrently lodged *Amicus Curiae* brief in the above-entitled case in support of Plaintiffs-Appellants/Cross-Appellees Anna Maria Alberghetti and Bonnie Pointer.

Amici have a vital interest in the issues raised by this case. As labor unions representing artists, including among others, actors and recording artists (collectively "artists") in the motion picture, television, commercial and new media industries, Amici are uniquely situated to provide additional insight into the impact this case may have on hundreds of thousands of individuals.

In their concurrently filed *amicus* brief, Amici provide insight into the history and nature of the right of publicity. Amici have long fought to preserve the rights of performers and others in their personas, including through nationwide legislative efforts. They strongly supported the enactment of and amendments to California's right-of-publicity statute, Civil Code Section 3344, as well as its companion statute protecting publicity rights of deceased individuals, Civil Code Section 3344.1.

Amici also provide further analysis of the copyright preemption argument raised by Corbis in its cross-appeal, including its impact on the very subjects of the

photographs Corbis sells. Additionally, Amici explain how the right of publicity, in itself, addresses the concerns raised by Corbis' amici.

Counsel for Plaintiffs-Appellants/Cross-Appellees have consented to the filing of this brief.

For the foregoing reasons, Amici respectfully request that the Court grant this Motion for leave to file the attached brief of *Amici Curiae*.

DATE: July 12, 2011

Respectfully submitted,

By: /s/ Duncan Crabtree-Ireland

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CORPORATE DISCLOSURE STATEMENT iii

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

 A. The Right of Publicity is a Property Right That Protects the
 Commercial Value in an Individual’s Persona..... 5

 1. The Right of Publicity Evolved from the Right of Privacy 5

 2. The Misappropriation of Professionals’ Personas Can Result in
 the Loss of Significant Financial Opportunities and Devastate
 Careers..... 8

 B. Plaintiff’s Claims Are Not Preempted by Copyright Law 9

 1. The Rights Protected By the Right of Publicity Are Not Within
 the Subject Matter of Copyright Law 11

 C. Corbis’ Use of the Names and Likenesses of Personalities Fails to
 Qualify under California’s Civil Code 3344(d) Public Affairs Defense
 or the First Amendment..... 16

 D. The District Court’s Opinion Has No Bearing on the Reporting and
 Dissemination of News and Information. 20

 E. The District Court’s Decision Would Not Wreak Havoc on News
 Reporting, But a Finding of Preemption May Open Individuals to
 New Forms of Exploitation..... 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001).. 3, 5, 8
Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536 (1993)18
Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001) passim
Eastwood v. Superior Court, 149 Cal. App. 3d 409 (1983) 6, 7, 17
Fleet v. CBS, Inc., 50 Cal. App. 4th 1911 (1996).....14
Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400 (2001).....18
Hilton v. Hallmark Cards, 580 F.3d 874 (9th Cir. 2009).....17
Jules Jordan Video, Inc. v. 144942 Canada, Inc., 617 F.3d 1146 (9th Cir. 2010) 12,
13
Laws v. Sony Music Entm't, Inc., 448 F.3d 1134 (9th Cir. 2006) 10, 14, 15
Lugosi v. Universal Pictures, 25 Cal. 3d 813 (1979) 7, 8, 9
Melvin v. Reid, 112 Cal. App. 285 (1931).....5
New Kids on the Block v. News Am. Publ'g Inc., 971 F.2d 302 (9th Cir. 1992).....18
Toney v. L'Oreal USA, Inc., 406 F.3d 905 (7th Cir. 2005)14
Uhlaender v. Henrickson, 316 F. Supp. 1277 (D. Minn. 1970)8
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)..... 3, 6, 9, 19

Statutes

17 U.S.C. §102.....11
17 U.S.C. §103.....11
17 U.S.C. §106.....10
17 U.S.C. §301.....10
CAL. CIV. CODE. §33447, 18

Other Authorities

1 NIMMER ON COPYRIGHT § 1.01[B][1][c] (2011) 11, 12
J. Thomas McCarthy, *Rights of Publicity and Privacy* §11.52 (2011).....11
Warren and Brandeis, *The Right of Privacy*, 4 Harvard L.Rev. 193 (1896)5

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *Amici* provide the following disclosures of corporate identity:

Amicus Screen Actors Guild (“SAG”) is the nation’s largest labor union representing working actors. Established in 1933, SAG represents over 125,000 performers who work in film and digital television, industrials, commercials, video games, music videos and all other new media formats. SAG exists to enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights. SAG certifies that it is a non-profit corporation; it does not offer stock; and it has no parent corporation.

Amicus American Federation of Television and Radio Artists, AFL-CIO (“AFTRA”) represents actors, singers, journalists, dancers, announcers, comedians, disc jockeys and other performers in television, radio, cable, sound recordings, music videos, commercials, audio books, non-broadcast industrials, interactive games and all formats of digital media. Founded in 1937, AFTRA today provides its more than 70,000 members nationally a forum for bargaining strong wages, benefits and working conditions and the tools and upward mobility to pursue their careers with security and dignity. AFTRA certifies that it is a non-profit unincorporated association; it does not offer stock; and it has no parent corporation.

Counsel for the parties did not author this brief. The parties have not contributed money intended to fund preparing or submitting the brief. No person other than amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

INTEREST OF THE AMICI

Amici represent entertainment industry professionals, including actors, recording artists, and other professional artists. The professionals represented by *Amici* invest considerable time, effort, and even money throughout their lives in developing, maintaining, and protecting the value in their personas and in building their professional careers. While many may never be "famous" in their own right, their names, voices, images or likenesses – their very personas – have or will attain commercial value. For many, this commercial value will continue long after their death, providing an important source of income for their families and beneficiaries. These individuals and their beneficiaries rely on laws, such as California's statutory and common law right of publicity, to protect and prevent misappropriation of one of their greatest assets – their personas.

SAG and AFTRA have long fought to preserve the rights of performers and others in their personas, including through nationwide legislative efforts. They strongly supported the enactment of and amendments to California's right-of-publicity statute, Civil Code Section 3344, as well as its companion statute protecting publicity rights of deceased individuals, Civil Code Section 3344.1. SAG and AFTRA have also filed amicus briefs in other right-of-publicity cases, such as *Keller v. Electronic Arts*, case number 10-15387 before this court, and *Christoff v. Nestlé, USA, Inc.*, 47 Cal.4th 468 (2009).

Amici and the individuals they represent are potentially affected by the outcome of this case. While the sale of the types of photos at issue herein for legitimate news reporting purposes may be acceptable, the sale to third parties whose intent is to use it for commercial purposes can be damaging to a performers' career and financial interests, as well as to those of their families. *Amici* therefore have a fundamental interest in ensuring these rights are not eroded.

Accordingly, *Amici* have an interest in this litigation.

SUMMARY OF ARGUMENT

At any point in time, there are thousands of individuals whose careers and livings arise from and are dependent upon the use of their personas. One cornerstone of their careers is their ability to exploit, and to control the exploitation of, their rights in these intangible but valuable assets. Critical to this are the protections embodied in rights of publicity laws which ensure that these public figures have the sole right to control how their rights are exploited.

Although derived from the right of privacy, the right of publicity has evolved into a form of intellectual property that represents the inherent right of every individual to control the commercial use of his identity. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001). Recognized by the Supreme Court over three decades ago, its rationale lies in the prevention of unjust enrichment through the theft of goodwill. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). California recognizes both a statutory and common law right of publicity.

The right of publicity is not preempted by the United States Copyright Act. To find preemption, the court must find that the subject matter of the claim falls within the subject matter of the Copyright Act and that the rights claimed are equivalent to one of the copyright holder's exclusive rights. Plaintiff's personas are not "original works of authorship" that are "fixed in a tangible medium of

expression” and are therefore not within the subject matter of the Copyright Act. Accordingly, Plaintiffs’ claims are not preempted.

The argument furthered by Corbis’ News Media Amici (“News Amici”) under California’s statutory public affairs defense or the First Amendment also fails. While the News Amici’s own activities may fall within the scope of these defenses, the defense does not extend to the commercial sale of photographs, particularly to parties whose own uses are not within the defenses’ scope.

Corbis posits a slippery slope down which the right of publicity would eviscerate the Copyright Act. Such is not the case. On the contrary, a finding of preemption in the commercial sale of photographs whose primary value comes from the depicted individual persona, would open a floodgate that threatens to wipe away the protections inherent in the right of publicity.

ARGUMENT

A. The Right of Publicity is a Property Right That Protects the Commercial Value in an Individual's Persona

The right of publicity is recognized as a form of intellectual property that society deems to have some social utility. It rests in the inherent right of every human being to control the commercial use of his or her identity. *Comedy III Prods., Inc.*, 25 Cal. 4th 387.

1. The Right of Publicity Evolved from the Right of Privacy

Recognition of privacy rights under common law is generally traced to the seminal Harvard Law Review article by Professors Warren and Brandeis, in which the authors discussed the necessity for protection from invasive reportage. Warren and Brandeis, *The Right of Privacy*, 4 Harvard L.Rev. 193, 196 (1896). In 1931, California courts recognized a common law "right to be left alone." In *Melvin v. Reid*, the court determined that while a motion picture could be based on facts found in the public record concerning the murder trial of a former prostitute, use of her true maiden name in the film would constitute an actionable invasion of privacy. *Melvin v. Reid*, 112 Cal. App. 285 (1931). By 1960, this common law right of privacy had evolved into four distinct categories of invasion, as identified by Dean Prosser:

(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Eastwood v. Superior Court, 149 Cal. App. 3d 409, 416 (1983) (citing Prosser, *Privacy*, 48 Cal.L.Rev. 383, 384 (1960)). It is Prosser's fourth category that eventually evolved and morphed into the modern right of publicity, separate and distinct from the right of privacy.

The Supreme Court recognized the right of publicity as an individual's proprietary right in his persona over three decades ago. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court expressed that the right of publicity "protect[s] the proprietary interest of the individual;" it "focus[es] on the right of the individual to reap the reward of his endeavors and [has] little to do with protecting feelings or reputation." *Zacchini*, 433 U.S. 562, 573 (1979). The "rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of goodwill." *Id.* at 576 (quoting Kalven, *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Prob. 326, 331 (1966)).

California recognizes both a statutory and common law cause of action for infringement of one's right of publicity. Section 3344 provides, *inter alia* that

“[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner ... for purposes of advertising or selling, or soliciting purchases ... without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition...in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use...”

CAL. CIV. CODE. §3344(a). The standard for finding a violation at common law is broader, and is pleaded by alleging “(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” *Eastwood*, 149 Cal. App. 3d 409, 417.

Performers and other public figures invest considerable time, money, and effort into developing their talent and skills, as well as creating commercial value in their personas to provide support for themselves and their beneficiaries. Those who have attained "celebrity" status have succeeded in creating an image or persona that has commercial value based on their “public visibility and the characteristics for which he or she is known.” *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 836 (1979) (Bird, C.J., dissenting). A performer's primary asset is himself and the ability to channel performances or a persona that can gain value and generate further economic opportunities. It is this goodwill that is protected by the right of publicity.

While public recognition and popularity may distinguish celebrities from other talented performers, there can be no question that the right of publicity simply reflects the ability of individuals to profit from the fruits of their labors. "A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status." *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1282 (D. Minn. 1970). See also, *Comedy III Prods*, 25 Cal. 4th 387; *Lugosi*, 25 Cal. 3d 813 (Bird, C.J., dissenting). This commercial value in one's persona is a valuable commodity, exploitation of which should rightfully be controlled by the individual or, upon his death, by his estate.

2. The Misappropriation of Professionals' Personas Can Result in the Loss of Significant Financial Opportunities and Devastate Careers.

For performing artists, the foundation of their careers is their ability to exploit their names, voices, likenesses, images, reputations and their very personas. This is also true for athletes whose endorsement income often far exceeds the income derived from their athletic pursuits and continues long after their playing days end. Loss of control over the nature of images, the manner in which such images are disseminated, the breadth of distribution, and the timing of dissemination, may all wreak severe economic consequences and, sometimes, career ruin. The unauthorized use of an individual's name or likeness in a

commercial manner may even limit the individual's opportunity to seek employment.

Unauthorized commercial appropriation of one's identity converts the potential economic value in that identity to another's advantage. The unauthorized user is unjustly enriched, reaping one of the benefits of the personality's investment in himself. *Lugosi*, 25 Cal. 3d at 441 (Bird, C.J., dissenting). As the Supreme Court noted, "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." *Zacchini*, 433 U.S. at 576 (quoting Kalven, *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 *Law & Contemp. Prob.* 326, 331 (1966)).

B. Plaintiff's Claims Are Not Preempted by Copyright Law

The United States Copyright Act, 17 U.S.C. §101 *et seq.*, defines and protects the rights of copyright holders, including the exclusive rights provided therein.¹ It also sets forth when a state law will be preempted. Section 301(a) provides that the Act shall exclusively govern "legal and equitable rights that are

¹ Section 106 of the Copyright Act provides that "the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work ... (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies ... of the copyrighted work... (4) ... to perform the copyrighted work publicly; (5) ... to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. §106.

equivalent to any of the exclusive rights within the general scope of copyright... in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright...” 17 U.S.C. §301(a). This preemption is tempered by Section 301(b) which expressly provides that the Act does not “annul[] or limit[] any rights or remedies... with respect to... subject matter that does not come within the subject matter of copyright...” 17 U.S.C. §301(b).

The Ninth Circuit has adopted a two-part test to determine if a state law claim is preempted by the Copyright Act. *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006); *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001). First, the court must “determine whether the ‘subject matter’ of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§102 and 103.”² *Laws*, 448 F.3d at 1137. If it does, the court will then “determine whether the rights asserted under state law are equivalent to the [copyright holders’ exclusive] rights contained in 17 U.S.C. §106.”*Id.* at 1137-

² Section 102 provides that “Copyright protection subsists... in original works of authorship fixed in any tangible medium of expression... from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device. Works of authorship include...” literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works. 17 U.S.C. §102.

Section 103 expands Section 102 to include “compilations and derivative works,” but “only to the material contributed by the author of such work, as distinguished from ... preexisting material employed in the work.” 17 U.S.C. §103.

1138. *See also, Downing*, 265 F.3d 994, 1003. If both elements of the test are met, a state law claim will be preempted.

1. The Rights Protected By the Right of Publicity Are Not Within the Subject Matter of Copyright Law

As the district court correctly found, Plaintiffs' claims are not preempted by Copyright Law because they do not fall within the subject matter of copyright. It is true that photographs typically are "original works of authorship" that are "fixed in a tangible medium of expression" and are therefore generally within the subject matter of copyright. Appellee's Answering Brief and Opening Cross-Appeal Brief at 19. *See also, Downing*, 265 F.3d at 1003. However, it is not the photographs that are the subject of the claims herein. Plaintiff's claims are based upon Corbis' commercial use of their names and likenesses – neither of which is a work of authorship under 17 U.S.C §102. *Downing*, 265 F.3d at 1003. *See also*, 1 NIMMER ON COPYRIGHT § 1.01[B][1][c] (2011); J. Thomas McCarthy, *Rights of Publicity and Privacy* §11.52 (2011). "The 'work' that is the subject of the right of publicity is the *persona*, *i.e.*, the name and likeness of a celebrity or other individual [and] a *persona* can hardly be said to constitute a 'writing' of an 'author' within the meaning of the Copyright Clause of the Constitution." 1 NIMMER ON COPYRIGHT § 1.01[B][1][c] (internal cites omitted). *See also* McCarthy, *Rights of Publicity and Privacy* §11.52 ("A picture is merely the means by which plaintiff may be

identifiable from defendant's unauthorized commercial usage. The picture is not 'the person.'"). As this court noted in *Downing*, this "is true notwithstanding the fact that [the] names and likenesses are embodied in a copyrightable photograph." *Downing*, 265 F.3d at 1004. See also, 1 NIMMER ON COPYRIGHT § 1.01[B][1][c] ("Such name and likeness do not become a work of authorship simply because they are embodied in a copyrightable work such as a photograph.").

Corbis' reliance on *Laws*, *Jules Jordan*, and *Fleet* is misplaced. In each of these cases, the right of publicity claim arose from a *copyrightable performance* that, itself, fell within the subject matter of copyright once it was fixed in a tangible medium of expression. Each of those plaintiff's claims was based upon the unauthorized or uncompensated reproduction of the *copyrightable performance* – performances that had been conveyed to the copyright holder by contract. In the instant matter, the subject of the Plaintiffs' claims is the uncompensated commercial use of their very personas.

Jules Jordan Video, Inc. v. 144942 Canada, Inc., 617 F.3d 1146 (9th Cir. 2010), involved the unauthorized reproduction of adult movies in which one of the plaintiffs, Ashley Gasper, performed. Gasper, the president and sole shareholder of the company, alleged a violation of his right of publicity in addition to infringement of the company's copyrights in the movies. Relying heavily on *Laws* and *Fleet*, and emphasizing that "the factual basis of his right of publicity claim

was the unauthorized reproduction of his *performance* on the DVDs,” the court held that Gasper’s right of publicity claim was preempted. *Jules Jordan Video*, 617 F.3d 1154 (emphasis added). The court reiterated that “[t]he question is whether the *rights* are works of authorship fixed in a tangible medium of expression and come within the subject matter of the Copyright Act. If a plaintiff asserts a claim that is *the equivalent of a claim for infringement* of a copyrightable work, that claim is preempted.” *Id.* at 1155 (emphasis added). *Jules Jordan* is clearly distinguishable from the instant matter as the claims at issue in *Jules Jordan* arose from a *copyrightable performance* fixed in a tangible medium of expression. Further distinguishing the case, as the court notes, “[t]he essence of Gasper’s claim is that the Kaytel defendants reproduced and distributed the DVDs [in which he and his company held the copyright] without authorization” in violation of the Copyright Act. *Id.*

In *Laws*, the plaintiff alleged that a Jennifer Lopez song which incorporated samples of her song, together with an accompanying booklet that provided an attribution credit in the form *required by the copyright license*, infringed her right of publicity. Laws had entered into an agreement with Elektra/Asylum Records (Elektra) expressly granting Elektra the right to “lease, license, convey or otherwise use or dispose of” the recordings of her song as well as to “use and to permit others to use [her] name... likeness, other identification, and biographical

materials...” in connection with the recordings. *Laws*, 448 F.3d at 1136. Expressly recognizing that the Copyright Act does not automatically preempt every right of publicity claim, the court held *Laws*’ claims were preempted. *Id.* at 1145.

The *Laws* court found *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (1996), persuasive. *Laws*, 448 F.3d at 1142. Much like *Laws*’ claims, *Fleet*’s right of publicity claim was based upon the unauthorized use of his *performance* as embodied within a copyrighted work, namely, a motion picture. The *Laws* court noted with approval the California Court of Appeal’s observation that “‘it was not merely [plaintiff’s] likenesses which were captured on film – it was their dramatic performances which are... copyrightable.’” *Id.* (quoting *Fleet*, 50 Cal. App. 4th at 1920-1921). It continued, noting that plaintiffs recorded performances “‘became ‘dramatic work[s]’ ‘fixed in [a] tangible medium of expression...’ [and] ‘[a]t that point, the performances came within the scope or subject matter of copyright law protection,’ and the claims were preempted.” *Id.*

The court also rejected *Laws*’ attempt to analogize her case to *Downing* and *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005) – both involving the unauthorized use of photographs – for reasons that are plainly applicable to this case. The court noted its conclusion in *Downing* that “‘it is not the publication of the photograph itself, a creative work of authorship, that is the basis for [plaintiffs’] claims, but rather, it is the use of the [plaintiffs’] likenesses and their names

pictured in the published photograph.” *Laws*, 448 F.3d at 1141. Similarly, the court noted the Seventh Circuit’s conclusion in *Toney* that, notwithstanding its embodiment in a photograph,

“Toney’s identity is not fixed in a tangible medium of expression. There is no ‘work of authorship’ at issue in Toney’s right of publicity claim. A person’s likeness – her persona – is not authored and it is not fixed. The fact that an image of the person might be fixed in a copyrightable photograph does not change this... The fact that the photograph itself could be copyrighted, and that defendants owned the copyright to the photograph that was used, is irrelevant to the [right of publicity] claim.”

Id. at 1142.

It is clear that *Downing* and *Toney* – two cases involving unauthorized use of individuals’ personas as embodied within photographs – are more similar to the instant matter than *Laws* and should guide the decision in this matter. As the district court concluded, “[t]he present case falls directly within the ambit of *Downing*, and ... *Downing* is therefore controlling.” Order Denying Defendant’s Motion to Dismiss at 7. “Name, likeness, and persona are not copyrightable subject matter, both under the Copyright Act and the Copyright Clause of the Constitution.” *Id.* at 8.

Accordingly, because the rights protected by the right of publicity do not fall within the subject matter of copyright, it fails the first prong of the test and, therefore, may not be preempted. Even if this court was to find that the test’s first

prong has been satisfied by the personas' embodiment within photographs, preemption still fails on the test's second prong. The rights Plaintiffs assert – namely, the right of publicity – are not equivalent to the exclusive rights set forth in the Copyright Act. Order Denying Defendant's Motion to Dismiss at 6. The right of publicity protects the commercial value in an individual's persona, regardless of the medium in which it is embodied. "Because the subject matter of... statutory and common law right of publicity claims is [individuals'] names and likenesses, which are not copyrightable, the claims are not equivalent to the exclusive rights contained in §106." *Downing* 265 F.3d at 1005 Accordingly, preemption fails under either prong of the Ninth Circuit's test.

C. Corbis' Use of the Names and Likenesses of Personalities Fails to Qualify under California's Civil Code 3344(d) Public Affairs Defense or the First Amendment.

News Amici's argument that California's public affairs defense or the First Amendment extends to Corbis' exploitation is inapposite. The statutory public affairs defense, Civil Code Section 3344(d) ("Section 3344(d)"), provides that an individual's consent is not required for the use of a personality's "name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." CAL. CIV. CODE §3344 (d). News Amici attempt to use this statutory exception and the First Amendment as a backdoor defense for Corbis to trample outright Appellant performers' rights. In

support of their premise, News Amici note that “publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it cannot ordinarily be actionable.” News Amici Brief 16 (citing *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 81 (2010)); see also, *Hilton v. Hallmark Cards*, 580 F.3d 874, 912 (9th Cir. 2009). There is no dispute that freedom of the press is vital, however, “this defense is not absolute, [and] ‘a proper accommodation between [the] competing concerns’ of freedom of speech and the right of publicity” must exist. *Downing*, 265 F.3d 994, 1001 (quoting *Eastwood*, 149 Cal. App. 3d 409, 422 (1983)).

Corbis’ online image licensing database, by contrast, simply does not constitute reporting of public information or news, even if its end-users might make such use of the photographs. News Amici’s authorities applying Section 3344(d) and the First Amendment all involved some nature of reporting news or information, clearly distinct from Corbis, which offers a self-standing commercial licensing database of personality images and other photographs. Although the News Amici muddle the authorities cited in support of each defense, they still fail to show that Corbis would prevail under either defense.

In *Gionfriddo v. Major League Baseball*, the California Court of Appeal held that the reporting of *baseball statistical information* served the public interest where the defendant had no commercial purpose. *Gionfriddo v. Major League*

Baseball, 94 Cal. App. 4th 400 (2001). Similarly, in *Dora v. Frontline Video, Inc.*, the court held that a *documentary* on surfing history was in the public interest. *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536 (1993). In contrast, in *Downing*, which the court below correctly applied to the instant case, this court held that an apparel merchant's use of photographs of individual surfers in its catalog did not bar the surfer's right of publicity claim. *Downing*, 265 F.3d at 1002. In so holding, the *Downing* court determined that the use was "essentially as window-dressing to advance the catalog's surf-theme" without connecting the surfers to any story about surfing. *Id.* Similarly, Corbis' commercial use of the photographs of Plaintiffs and other public figures is "window dressing" to market its online database and attract customers. News Amici further cite to *New Kids*, which dealt with the use of the musical act's name in a newspaper poll of its readers. *New Kids on the Block v. News Am. Publ'g Inc.*, 971 F.2d 302 (9th Cir. 1992). Albeit based also on a trademark issue, the court therein determined that the newspaper qualified for California's statutory public affairs defense as the band's name was published as a part of the news stories. *Id.* at 310. In contrast, although the News Amici may qualify for the statutory defense when using an individual's persona in connection with a true account, Corbis' commercial use fails under this reasoning.

Indeed, the public interest in knowing baseball statistics or taking a newspaper poll on a popular band, or even watching a documentary on surfing history, is more obvious than any news or information attained through a database of celebrity images. It is undeniable from the cases *sub judice* that courts have generally barred actionable publicity claims where the owner's or publisher's specific use of the individual's persona is for the reporting and the dissemination of news and information to serve the public interest. Courts have not, however, extended the defense to tangentially related uses doing otherwise.

In sum, Corbis does not provide any news or information through its licensing database and therefore is not statutorily exempt under Section 3344(d). Rather Corbis' business is built on "unjust enrichment by the theft of [Plaintiffs'] goodwill" in their names and likenesses built through their hard work and talent as professional actors and recording actors over many years. *Zacchini*, 433 U.S. at 576. If this Court held otherwise, the necessary and fragile balance that has long existed in protecting an individual's right of publicity with public reporting interests would be eviscerated. For these reasons, Corbis has not shown that it can avail itself under the public affairs defense for using photographs of the Plaintiffs in its commercial licensing business.

D. The District Court's Opinion Has No Bearing on the Reporting and Dissemination of News and Information.

The district court's holding will not create any invented havoc to the news industry as Corbis and its News Amici prophesize. As discussed *supra*, the manner in which the press uses the names, likenesses, and photographs of individuals in connection with news reporting would be exempt under California's public affairs defense and the First Amendment. This lays to rest any concerns of obstruction to reporting and dissemination of news and information to meet the public demand and need. Extending such defenses to Corbis and similar businesses would devastate the protections afforded individuals by over-extending the protections reserved for reporting factual news and information to the public.

In addition, where the uses of photos and images qualify, press and other news media can use the images without having to obtain the depicted individual's consent. However, the News Amici urge this Court to go further by extending similar rights to Corbis and other commercial online image licensing giants which could be better addressed through contractual relationships rather than by circumventing the publicity rights of personalities such as Ms. Alberghetti and Ms. Pointer. *See also*, Appellant's Third Cross Appeal Brief at 9 (citing Judge Goldberg's opinion, affirmed by *Brown v. Corbis*, 375 Ill. App. 3d 276 (2007)).

This would prevent any unnecessary delays in news reporting, and resolve any inflated concerns of hampering the free flow of information to the public.

This court should affirm the lower court's decision on the issue below as Corbis has failed to show how it can avail itself under these defenses.

E. The District Court's Decision Would Not Wreak Havoc on News Reporting, But a Finding of Preemption May Open Individuals to New Forms of Exploitation.

Corbis veers down a slippery slope portending a "parade of horrors" that would occur if Plaintiffs' claims are not preempted by copyright. Corbis presages a scenario in which a holding in favor of Plaintiffs would, in essence, prevent the holder of a photograph's copyright from ever engaging in any compensated exploitation of that photograph. Corbis has within its power many options to avoid this "parade of horrors." For example, it may limit its licenses to parties who have a legitimate news-reporting, public interest, or other protected use for the photographs or require proof that a licensee has obtained the subjects consent prior to granting a license for purposes other than a protected use. It could also obtain the necessary consent, itself, and sublicense it to the third-party licensees.

Corbis may serve a useful service to parties like News Amici; it also aids those who would blatantly infringe upon and profit from the individuals in its photographic database. Through its failure to take any steps to limit dissemination of its photographs or ensure the appropriate consents are obtained, Corbis itself has

wrongfully tread upon those individuals' rights. Corbis, as a gatekeeper to the images, should not be able to simply bury its head in the sand as to the licensees' intents and escape liability for its own overtly commercial activities.

Much like Corbis' slippery slope, a holding of preemption could open the door to far more egregious exploitation than in the instant matter. Under such a holding, there would be no limitation, unless expressly contracted for, preventing a photographer from commercially exploiting, or licensing others to commercially exploit, photographs of individuals who have not consented to commercial use. This could be especially problematic in the case of photographs taken by ever-increasingly aggressive paparazzi who frequently put the safety and privacy of their subjects at risk for photographs. If those photographs could be commercially licensed without restriction, the incentives for them to engage in such behavior would increase, further exacerbating an already problematic situation.

Similarly, many event and portrait photographers may find ways to profit from the activities for which they are retained and paid. Often, these photographers retain copyrights in the photographs they take, either expressly by contract or by omission of a transfer clause in the contract. Under Corbis' formulation, these photographers would be free to commercially exploit the photographs they were paid to take, whether weddings, parties or family portraits, without obtaining any consent from the individuals who trusted them with their intimate moments. Surely

this was not the Copyright Act's intent, however, a finding of preemption in the instant matter could have just such a result.

CONCLUSION

The district court's decision on the motion to dismiss was proper and should be affirmed by this court. It struck the proper balance between the protections afforded the individual under the right of publicity and the protections afforded the photograph's owner under the Copyright Act. California's statutory public affairs exemption and the First Amendment protect, and will continue to protect, the legitimate news reporting functions provided by the News Amici while protecting against blatant commercial uses. A holding of preemption, however, would open the door to a far greater injustice.

DATE: July 12, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE.

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 5,169 words, excluding those parts of the brief that the Rule exempts from the word-count limitation, which is less than the 7,000 words permitted by Fed. R. App. P. 29(d).

DATE: July 12, 2011

By: /s/ Duncan Crabtree-Ireland
DUNCAN CRABTREE-IRELAND

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion for Leave to File Brief of Amici Curiae in Support of Plaintiffs-Appellants/Cross-Appellees by Screen Actors Guild, Inc. and American Federation of Television & Radio Artists, AFL-CIO and the accompanying Brief of Amici Curiae in Support of Plaintiffs-Appellants/Cross-Appellees by Screen Actors Guild, Inc. and American Federation of Television & Radio Artists, AFL-CIO with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 12, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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