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Star Wars: The Battle to Protect the Rights of Publicity of America’s Astronauts

by ROBERT C. O’BRIEN* AND PAUL A. ALARCÓN**

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I. Introduction: Humanity's Ambassadors to the Heavens

On July 20, 1969, Apollo 11 astronauts Neil Armstrong and Buzz Aldrin became the first human beings to land on the surface of the moon. Thereafter, Armstrong stepped off the "Eagle" and said, "[t]hat's one small step for a man, one giant leap for Mankind."¹ It is estimated that 600 million viewers watched the moon landing.² During this time, Neil Armstrong took some of the most memorable and awe-inspiring photographs and film ever, including one of his fellow astronaut, Buzz Aldrin.³ While on the moon, the astronauts received a phone call from President Richard Nixon. He told them, "because of what you have done, the heavens have become a part of man's world . . . For one priceless moment in the whole history of man, all the people on this Earth are truly one."⁴ The Apollo 11 astronauts were heroes.

Upon their return to Earth, the astronauts quickly became cultural celebrities, receiving the Presidential Medal of Freedom and appearing in parades throughout the world.⁵ New York City welcomed the astronauts from the Apollo 11 mission with a ticker tape parade, which was, at the time, the largest parade in the city's history.⁶ The astronauts also travelled the world in the Giantstep-Apollo 11 Presidential Goodwill Tour, which carried the astronauts through twenty-four countries and twenty-seven cities in forty-five days.⁷ The public's appetite for information about the historic moon walk and for the astronauts themselves was insatiable. Not only were the photographs and film taken on the moon's surface immensely valuable as historic and scientific records, they had tremendous commercial value, gracing the cover of virtually every magazine that mattered at the time — the July 25, 1969 edition of *Time Magazine*, the

1. NASA PUBLIC AFFAIRS, THE KENNEDY SPACE CENTER STORY (1991), available at <http://www.nasa.gov/centers/kennedy/about/history/story/ch8.html>.

2. NASA PUBLIC AFFAIRS, *supra* note 1.

3. BUZZ ALDRIN & KEN ABRAHAM, MAGNIFICENT DESOLATION: THE LONG JOURNEY HOME FROM THE MOON 39 (Crown Archetype 2009).

4. BUZZ ALDRIN & KEN ABRAHAM, *supra* note 3.

5. *Biographies of Apollo 11 Astronauts*, PROJECT APOLLO, <http://history.nasa.gov/ap11ann/astrobios.htm> (last visited Mar. 2, 2015).

6. Michael Hahn, *New York City Welcomes the Apollo 11 Astronauts*, GREAT IMAGES IN NASA, <http://grin.hq.nasa.gov/ABSTRACTS/GPN-2002-000034.html> (last updated May 13, 2010).

7. Michael Hahn, *President Nixon Meets the Apollo 11 Astronauts on the Lawn of the White House*, GREAT IMAGES IN NASA, <http://grin.hq.nasa.gov/ABSTRACTS/GPN-2002-000019.html> (last updated May 13, 2010).

August 8, 1969, edition of *Life Magazine*, and *Life Magazine*'s Special Report of the Apollo 11 mission.⁸

Subsequent journeys to the moon and into space have produced further iconic photographs. For example, on August 1, 1971, Col. James Irwin, the Lunar Module Pilot for the Apollo 15 mission, was captured in a now-famous photograph saluting the flag while on the moon's surface with the lunar module in the background. In 1984, Bruce McCandless was the first astronaut to make an untethered free flight in space and a well-recognized photograph shows him flying in space about 320 meters away from the cargo bay of the space shuttle Challenger.

Interest in the early days of space exploration has not waned. Hollywood has produced numerous films and television programs regarding astronauts and their journey to the moon. Notably, Ron Howard directed the feature film *Apollo 13* in 1995, drawing enormous crowds worldwide and earning over \$355 million.⁹ Similarly, HBO produced *From the Earth to the Moon*, a twelve-part mini-series that chronicled the Apollo expeditions to the moon, which cost approximately \$68 million to produce.¹⁰

Since the early days of the American space program, companies have recognized the commercial value of associating their products with an astronaut's identity and have sought to capitalize on the goodwill engendered by them. These companies retained astronauts as product spokespersons and have licensed the use of their names, likenesses, images, or identities in advertising for considerable value.¹¹ For example, shortly after Alan B. Shepard, the first American to travel to outer space, returned from his historic flight, he was presented with a new 1962 Corvette from General Motors, as were other astronauts from the Mercury, Gemini, and

8. Neil Armstrong, TIME, July 25, 1969, <http://www.time.com/time/covers/0,16641,19690725,00.html> (last visited Mar. 2, 2015); Time Life Pictures, *Footprints and Photographs by Neil Armstrong and Edwin Aldrin*, LIFE, Aug. 8, 1969, <http://www.gettyimages.com/detail/50704185/Time-Life-Pictures> (last visited Mar. 2, 2015); Ben Cosgrove, 'To the Moon and Back': LIFE's Complete Special Issue on Apollo 11, LIFE, Aug. 8, 1969, <http://life.time.com/history/apollo-11-to-the-moon-and-back-life-magazine-lunar-landing/#1>.

9. *Apollo 13*, BOX OFFICE MOJO, <http://boxofficemojo.com/movies/?id=apollo13.htm> (last visited Mar. 2, 2015).

10. *From the Earth to the Moon*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0120570/business> (last visited Mar. 2, 2015).

11. ALDRIN & ABRAHAM, *supra* note 3, at 256-65; JAMES HANSEN, FIRST MAN: THE LIFE OF NEIL A. ARMSTRONG 627-28 (Simon & Schuster 2005); Mem. of P. & A. in Supp. of Pl. Nancy Conrad's Mot. for Prelim. Inj. at 3-4, *Conrad v. Media Group*, No. SA CV 00-570-DOC (Anx) (C.D. Cal. Aug. 30, 2000) (from 1992 to 1999 Dura Lube paid Conrad nearly \$400,000 to use Conrad's celebrity in marketing its products).

Apollo space programs.¹² Astronauts have also appeared in television commercials or have otherwise promoted a variety of products for corporations such as Boeing,¹³ Fidelity Investments,¹⁴ General Motors,¹⁵ Hasbro Inc.,¹⁶ HBO,¹⁷ Honda,¹⁸ Jockey International, Inc.,¹⁹ Kodak Film,²⁰ Louis Vuitton,²¹ Nike,²² PepsiCo,²³ Progressive Insurance,²⁴ Snapple Beverages,²⁵ and Volkswagen,²⁶ to name a few.

Although many companies recognize that astronauts should be compensated for the use of their celebrity status for commercial purposes,²⁷ a number of companies have used astronauts' names, images, likenesses, and voices without obtaining permission from or providing compensation to the astronaut whose identity has been invoked for commercial purposes. Seeking to protect the commercial value and goodwill associated with their names, several astronauts have challenged, most commonly in California,

12. *Commemorating 50 Years of Corvettes and Astronauts*, GM NEWS (May 5, 2011), http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2011/May/0505_corvettes.html.

13. Zack Winnick, *Buzz Aldrin, Topps Butt Heads Over Iconic Moon Shot*, LAW 360 (Apr. 25, 2011, 9:28 PM), <http://www.law360.com/articles/241324/buzz-aldrin-topps-butt-heads-over-iconic-moon-shot>.

14. David Gianatasio, *Fidelity Makes Strange Bedfellows*, AD WEEK (Oct. 18, 1999, 12:00 AM), <http://www.adweek.com/news/advertising/fidelity-makes-strange-bedfellows-41186>; Dale Buss, *Online Advertising Report - 11 Fidelity Investments*, MARKETING MAG. (Aug. 1, 2000), <http://www.marketingmagazine.co.uk/article/136992>.

15. Winnick, *supra* note 13.

16. Rebecca Maksel, *Guys and Dolls: G.I. Joe Is 50*, AIRSPACEMAG. (Feb. 6, 2014), <http://www.airspacemag.com/daily-planet/guys-and-dolls-gi-joe-turns-50-180949667/?no-ist>.

17. Winnick, *supra* note 13.

18. *See* Winnick, *supra* note 13.

19. *Jockey Unveils New Men's Marketing Campaign "Supporting Greatness,"* JOCKEY BLOG (Aug. 19, 2014), <http://blog.jockey.com/jockey-unveils-mens-marketing-campaign-supporting-greatness/>.

20. Winnick, *supra* note 13.

21. Rachel Dodes, *New Vuitton Ad Campaign: The Right Stuff?*, WALL ST. J. SPEAKEASY BLOG (June 1, 2009, 12:01 AM), <http://blogs.wsj.com/speakeasy/2009/06/01/new-vuitton-ad-campaign-the-right-stuff/>.

22. Winnick, *supra* note 13.

23. *See* Winnick, *supra* note 13.

24. *Buzz Aldrin Highlights and Achievements*, http://buzzaldrin.com/files/pdf/Highlights_Achievements.pdf (last visited Sept. 14, 2015).

25. Winnick, *supra* note 13; Christy Fisher, *Star Fails to Rise for Moon Landing*, ADVER. AGE, (June 20, 1994), available at <http://adage.com/article/news/star-fails-rise-moon-landing/86579/>.

26. *See* Advertisement, LIFE 4 (Apr. 28, 1972).

27. ALDRIN & ABRAHAM, *supra* note 3, at 264 ("Fortunately, most of my commercial endeavors were about building positive relationships, rather than chasing after infringements.")

the unauthorized commercial use of their name and likeness by invoking common law and statutory causes of action that protect one's right to control the commercial use of one's identity — often referred to as the right of publicity.²⁸ Although their efforts have not led to a published opinion, the results have been highly favorable for the astronauts and, in many cases, enjoyed considerable media attention prior to settlement.

This article examines the efforts by astronauts to establish and protect their publicity rights. Part I summarizes the development of the right of publicity generally. Part II discusses the development of that right within California jurisprudence. Part III analyzes the arguments offered against astronauts who have been compelled to protect their publicity rights in court. Finally, Part IV addresses practical concerns arising from the prospect of facing off against an astronaut (or his or her estate) before a jury. This article concludes that an astronaut generally will be able to successfully invoke right-of-publicity laws against companies that use the astronaut's name or image in products and advertising without securing a license.

II. The Origins of the Right of Publicity

The right of publicity “is the inherent right of every human being to control the commercial use of his or her identity.”²⁹ Whether based on common law or established by statute, claims for misappropriation of the publicity rights of both living and deceased persons most commonly involve the unauthorized use of an individual's identity on merchandise or in the advertising of goods or services.³⁰

This right historically derives from state privacy law, which in turn was first concretely articulated by Louis Brandeis and Samuel D. Warren in their now-famous 1890 law review article, “The Right to Privacy.”³¹ After Brandeis and Warren's article was published, states began to recognize

28. ALDRIN & ABRAHAM, *supra* note 3, at 256–65; HANSEN, *supra* note 11, at 627–28.

29. 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2010). Of course, such control implies not only the power to permit a particular use, but also the power to refuse a use. See *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996) (“[T]he right of publicity protects not only a celebrity's ‘sole right to exploit’ his identity, but also his decision not to use his name or identity for commercial purposes.”) (citation omitted).

30. Bela G. Lugosi, *Competing Perspectives and Divergent Analyses California Expands the Statutory Right of Publicity for Deceased Celebrities While Its Courts are Examining the First Amendment Limitations of That Statute*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y, 259, 261 (2000).

31. MCCARTHY, *supra* note 29, § 1:4; Robert T. Thompson III, *Image As Personal Property: How Privacy Law Has Influenced the Right of Publicity*, 16 UCLA ENT. L. REV. 155, 161 (2009).

privacy rights.³² Initially, these rights amounted simply to the right to be left alone.³³ However, celebrities began to complain about the commercialization of their identities not so much because they wanted to be left alone, but rather because they wanted “to control when, where and how their identity” was used and to receive compensation for that use.³⁴ In 1953, the Second Circuit concluded that the common law of New York recognized just such a right in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*³⁵ The *Haelan* court held

[T]hat, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made “in gross,” i.e., without an accompanying transfer of a business or of anything else.³⁶

The *Haelan* court remarked that “[t]his right might be called a ‘right of publicity.’”³⁷

This innovation was not received with immediate and universal acclaim.³⁸ Nevertheless, other courts slowly began to embrace the idea that a person should not only be able to demand to be left alone, but also be able to exercise some say in the commercial use of their identity by others.³⁹ Over time, “practical and economic concerns resulted in recognizing publicity as a separate tort, which transformed it into an interest in property rather than privacy.”⁴⁰ Thus, during the 1970s, beginning with California,

32. MCCARTHY, *supra* note 29, §§ 1:4, 1:15–18.

33. MCCARTHY, *supra* note 29, § 1:7.

34. MCCARTHY, *supra* note 29, § 1:7. This is not to imply that the right is limited to celebrities. *See* Nimmer Article, 217 (“Since its inception, authorities have recognized that ‘the right should be available to everyone.’”).

35. *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“We think the New York decisions recognize such a right.”).

36. *Id.*

37. *Id.*

38. *See* *Strickler v. Nat’l Broad. Co.*, 167 F. Supp. 68, 70 (S.D. Cal. 1958) (“This Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity.”); MCCARTHY, *supra* note 29, § 1:29.

39. *Hogan v. A. S. Barnes & Co., Inc.*, No. 8645, 1957 WL 7316 (Ct. Com. Pl. Pa. June 19, 1957); *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401, 407 (E.D. Pa. 1963); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 504 (Ga. Ct. App. 1966); *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970), *abrogated by* *Dryer v. Nat’l Football League*, No. 09-2182 (PAM/FLN), 2014 WL 5106738 (D. Minn. Oct. 10, 2014).

40. *Thompson*, *supra* note 31, at 157.

five states passed statutory protections that encompass the right of an individual to control the commercial exploitation of his or her identity.⁴¹ In 1977, the United States Supreme Court decided *Zacchini v. Scripps-Howard Broadcasting Co.*, the only right-of-publicity case the Court has ever taken.⁴² The Court observed that “[t]here is no doubt . . . that the right of publicity which petitioner was held to possess was a right arising under Ohio law.”⁴³ As the Court recognized, “[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.”⁴⁴ Since that time, the right of publicity has become an unquestionable fixture of American jurisprudence.⁴⁵

III. The Right of Publicity in California

Because many of the right-of-publicity actions brought by astronauts have been filed in California, this article focuses on California law and jurisprudence.⁴⁶ However, as the prior section establishes, the right of publicity is recognized in other states as well.⁴⁷

In California, both the common law and statutory law protect the right of a person to control the commercial use of his or her identity.⁴⁸ California’s common law cause of action (often referred to as “commercial misappropriation” but substantively indistinguishable from the right of publicity) is available to a plaintiff who can establish (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.⁴⁹

41. CAL. CIV. CODE § 3344 (West 1972); R.I. GEN. LAWS § 9-1-28 (West 1972); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 197[3/4]); WIS. STAT. ANN. § 995.50(2)(b) (West 1977); NEB. REV. STAT. § 20-202 (1979).

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

43. *Id.* at 566.

44. *Id.* at 576 (citing Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *Law & Contemp. Probs.* 326, 331 (1966)).

45. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (1995); McCarthy, *supra* note 29, § 1:38.

46. *See infra* note 62.

47. McCarthy, *supra* note 29, § 6:3 (“[U]nder either statute or common law, the right of publicity is recognized as the law of 31 states.”).

48. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1183 (9th Cir. 2001).

49. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001).

Section 3344 of the California Civil Code compliments the common law cause of action for commercial misappropriation.⁵⁰ As initially enacted, Section 3344 “applied only to an unauthorized use ‘for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of purchases of products . . .’”⁵¹ In 1984, Section 3344 “was amended to encompass any unauthorized use ‘on or in products, merchandise, or goods . . .’”⁵² Even in its current state, however, Section 3344 is narrower than the common law right of publicity in a few distinct ways.

First, the section requires that the defendant’s use be *knowing* and that the use have a *direct connection* to the commercial purpose.⁵³ Second, the Ninth Circuit has observed that Section 3344 “is apparently limited to commercial appropriations.”⁵⁴ Third, the Ninth Circuit has held that California’s common law right of publicity, which applies to the misappropriation of another’s “identity,” is broader than the statutory right, which applies only to the misappropriation of another’s “name, voice, signature, photograph, or likeness . . .”⁵⁵ This final distinction, however, has been criticized by at least one California court.⁵⁶ Suffice to say, in addition to proving the elements of the common law cause of action, a plaintiff making a claim under Section 3344 must allege a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.⁵⁷

50. Eastwood v. Superior Court, 149 Cal. App. 3d 409, 416–17 (1983); CAL. CIV. CODE § 3344(g) (West 1972) (“The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.”).

51. KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 717 n.5 (2000) (quoting CAL. CIV. CODE § 3344(a) (West 1972)).

52. *Id.*

53. CAL. CIV. CODE § 3344 (West 1972) (“Any person who *knowingly* uses another’s name, voice, signature, photograph, or likeness, in any manner . . .”) (emphasis added).

54. Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 414 (9th Cir. 1996).

55. *Id.* (citing White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992), *as amended* (Aug. 19, 1992); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988)).

56. Ackerman v. Ferry, 2002 WL 31506931, at *17 (Cal. Ct. App. Nov. 12, 2002) (“We note that although no California court has addressed such a theory, our Supreme Court has described the reach of the statute in dicta as protecting ‘identity’ . . . as well as ‘personality.’” (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 395 (2001); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 461 (1979))).

57. See Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (1983); CAL. CIV. CODE § 3344(a) (West 1972) (“Any 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, or soliciting purchase of, products, merchandise, goods or services, without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”).

Where the person whose identity is being misappropriated has died, Section 3344.1 provides a posthumous right of publicity by establishing a cause of action belonging to that person to whom the interest has been transferred or to whom it has descended. Under Section 3344.1, such a person may sue for the unauthorized use “in any manner” of a deceased person’s “name, voice, signature, photograph or likeness” for commercial purposes.⁵⁸ Section 3344.1 requires “proof of the same elements” as Section 3344.⁵⁹

IV. Astronauts Vindicate Their Right of Publicity

Astronauts have consistently resisted the infringement of their right of publicity when their identities have been used for commercial purposes without their consent.⁶⁰ During litigation, offending companies have raised

58. CAL. CIV. CODE § 3344.1(a)(1) (West 1972) (“Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof.”).

59. Estate of Fuller v. Maxfield & Oberton Holdings, LLC, 906 F. Supp. 2d 997, 1007 (N.D. Cal. 2012); *see also* Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 392 (2001) (“The statute was evidently modeled on section 3344: many of the key provisions of the two statutory schemes were identical”); (Unlike Section 3344, Section 3344.1(a)(1) omits the word “knowingly.”).

60. *See, e.g.*, Aldrin, *supra* note 3, at 263–64 (discussing right-of-publicity actions filed against such companies as Bacardi-Martini, a liquor company, Omega, a watch manufacturer, and Action Products, a toy company); Hansen, *supra* note 11 at 627–28 (describing lawsuit by Neil Armstrong against Hallmark for use of his likeness on an ornament); Bill Romano, *Neil Armstrong sues over use of name in ad*, BOCA RATON NEWS, Feb. 6, 1997, at 16A (describing lawsuit by Neil Armstrong against producers of ergonomic office equipment who used Armstrong’s name a photograph in advertisements), *available at* <http://news.google.com/newspapers?nid=1291&dat=19970206&id=1CIUAAAAIIBAJ&sjid=TY4DAAAAIIBAJ&pg=4495,1731221> (also described on page 28 of company’s SEC filing, *available at* <http://www.sec.gov/Archives/edgar/data/1042488/0000950134-97-006219.txt>); Conrad v. Media Group, No. SA CV 00-570-DOC (Anx) (C.D. Cal. Aug. 30, 2000) (action based on use of deceased astronaut Charles “Pete” Conrad Jr.’s likeness to promote automobile-related products); Aldrin v. Unified Precious Metals, Inc., No. BC 220608 (Cal. Super. Ct. Jan. 21, 2000) (action based on use of astronaut Buzz Aldrin’s photograph on commemorative medallion); Conrad v. Action Prods, Inc., No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000) (action based on use of lunar landing photograph, containing astronauts Aldrin, Conrad, and James B. Irwin, on the back of packaging of toy); Irwin v. Fisher Pen Co. Nev., 2002 WL 31961659 (Cal. Super. Ct. Sept. 17, 2002), *available in* 3 TRIALS DIGEST 6th 11 (Jan., 20, 2003) (action based on use of photograph containing astronaut James Irwin in products as well as packaging and advertisements); Aldrin v. Encore Software, No. BC 305356 (Cal. Super. Ct.), *available in Unauthorized Use of Famed Lunar Photo Alleged to Violate Astronaut’s Publicity Rights*, 8 ELEC. COMMERCE & LAW (BNA) 1153, 1168 (2003) (discussing software product packaging containing Visor Shot of Aldrin); Universal Spaceworks v. Intervisual Commc’ns, No. SC 063264 (Cal. Super. Ct.); Aldrin v. Topps Co., Inc., 2011 WL

a variety of arguments for the proposition that astronauts should not enjoy a right of publicity; or, at least, that the particular appropriation did not run afoul of the right. Some of these defenses are uniquely tied to the astronaut's status *qua* astronaut, including that (1) an astronaut is not "readily identifiable" in a photograph of the astronaut within a space suit;⁶¹ (2) advertisements and merchandise related to the events surrounding astronauts should be exempt from right-of-publicity claims under the First Amendment because such events are of significant historical and public interest;⁶² (3) astronauts should be precluded from invoking the right of publicity because they are employed by the United States government and some are members of the United States Armed Forces;⁶³ and (4) NASA has placed the iconic photographs of astronauts within the public domain.⁶⁴

As discussed below, however, these arguments are inconsistent with the controlling precedents. Indeed, in the few cases these arguments have been advanced, they have nearly unanimously met with defeat.

4500013 (C.D. Cal. Sept. 27, 2011) (action based on use of Visor Shot of Aldrin); Aldrin v. Bacardi-Martini U.S.A., Inc., No. SACV 98-544 LHM (EEx) (C.D. Cal.) (action based on use of astronaut's photograph in connection with advertisement for alcohol beverage); Ben Evans, *Plenty of People to Talk to Me': 30 Years Since First Untethered Spacewalk (Part 2)* (Feb. 2, 2014) (noting that Astronaut Bruce McCandless and singer Dido amicably settled a dispute arising from the use of McCandless in space on one of Dido's album covers), available at <http://www.americaspace.com/?p=50663>; see also Yeager v. Virgin Am. Inc., 2014 WL 801421 (Cal. Ct. App., Feb. 28 2014) (action based on right-of-publicity claims by Charles E. "Chuck" Yeager, who was the first pilot to exceed the sound barrier and was discussed in Tom Wolfe's celebrated book about the early space program, "The Right Stuff"); Yeager v. Advanced Micro Devices, Inc., No. 109CV151913 (Cal. Sept. 10, 2009) (discussing same).

61. See Opp'n to Mot. for Prelim. Inj. 3, Aldrin v. Unified Precious Metals, Inc., No. BC 220608 (Cal. Jan. 21, 2000); 3 TRIALS DIGEST 6th 11 (Jan. 20, 2003) ("Defendants The Fisher Pen Company of Nevada and Paul C. Fisher dba Fisher Space Pen Company contended that the photograph used in their products and advertising portrayed a generic astronaut rather than the identifiable image of Col. Irwin. They contended that Col. Irwin was not recognizable in a space suit."); Opp'n to Mot. for Prelim. Inj. 7-10, Conrad v. Action Prods., Inc., No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000); Compl. 4, Aldrin v. Bacardi-Martini U.S.A., Inc., No. SACV 98-544 LHM (EEx) (C.D. Cal. June 23, 1998).

62. See Dem. to Pl.'s Compl. 7-10 & Opp'n to Mot. for Prelim. Inj. 4-5, Aldrin v. Unified Precious Metals, Inc., No. BC 220608 (Cal. Jan. 21, 2000); Resp. to Mot. for Prelim. Inj. 14-18, Conrad v. Action Prods., Inc., No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000); Mot. to Strike Compl. 14-17 & Opp'n to Mot. for Prelim. Inj. 9-12, Aldrin v. Topps Co., Inc., No. CV 10-09939 DDP (FMOx), 2011 WL 4500013 (C.D. Cal. Sept. 27, 2011).

63. See Opp'n to Mot. for Prelim. Inj. 3, Aldrin v. Unified Precious Metals, Inc., No. BC 220608 (Cal. Jan. 21, 2000).

64. *Id.*; Resp. to Mot. for Prelim. Inj. 13-14, Conrad v. Action Prods., Inc., No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000).

A. An Astronaut is “Readily Identifiable” in an Iconic Photograph of Him or Her in a Space Suit During a Space Exploration Mission

Where a defendant misappropriates a photograph or likeness of a plaintiff, a plaintiff must establish that he or she is “readily identifiable” in the misappropriated image.⁶⁵ Civil Code Section 3344(b)(1) provides the standard: “A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.” As stated above, companies that misappropriate the iconic photographs of astronauts in their space suits during missions have argued that an astronaut within a space suit is not “readily identifiable” because his facial features are not visible. This argument fails, however, where the subject of a photograph can be “readily identifiable” even though the facial features of the subject are not visible from the photograph or image.

In *Newcombe v. Adolf Coors Co.*, the Ninth Circuit held that an advertisement by defendant Adolf Coors Co. misappropriated the identity of former major league baseball Dodger all-star Donald Newcombe.⁶⁶ That advertisement contained a drawing of a baseball pitcher in a windup position and the background included a single infielder and an old-fashioned outfield fence. The depicted player’s facial features were not clearly visible. The players’ uniforms did not depict an actual team, and the background did not depict an actual stadium. However, Newcombe, along with family, friends, and former teammates, immediately recognized the pitcher featured in the advertisement as Newcombe in his playing days.

In reaching its decision, the court noted that the drawing was virtually identical to a photograph of Newcombe from a newspaper taken years prior. The pitcher’s distinctive stance, proportions, and shape were identical to the photograph, and even the styling of the uniform was identical, right down to the wrinkles in the pants. On this basis, the court stated that “[a] jury could rationally find from this that Newcombe was readily identifiable, even though his facial features were not entirely visible.”⁶⁷

Similarly, in *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the plaintiff was Lothar Motschenbacher, an internationally famous race car driver. Motschenbacher was known for “individualizing” his car to set it apart from those of other drivers and to make it more readily identifiable as

65. *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998).

66. *Id.*

67. *Id.*

his own.⁶⁸ Defendant R.J. Reynolds Tobacco Company produced a television commercial that used an image of Motschenbacher's racing car in an advertisement with the word "Winston," the name of its product, on the car.⁶⁹ Motschenbacher's facial features behind the car's windshield and helmet were not visible in the image. Motschenbacher brought an action against R.J. Reynolds for injunctive relief and damages for misappropriation of his name, likeness, and personality in the United States District Court for the Central District of California. Several of plaintiff's affiants, who had seen the commercial on television, had immediately recognized Motschenbacher's car and had inferred that it was sponsored by Winston cigarettes.⁷⁰ Notwithstanding, the district court granted summary judgment in favor of R.J. Reynolds, holding that the driver of the car in the commercial was anonymous, unrecognizable, and unidentified, and that a reasonable inference could not be drawn that the driver was Motschenbacher.⁷¹

On appeal, the Ninth Circuit, applying California law, held that the "likeness" of Motschenbacher was not recognizable, but that the driver of the car was nonetheless identifiable as Motschenbacher.⁷² In reaching this conclusion, the court noted that the district court failed to attribute proper significance to the uniquely distinguishing decorations appearing on Motschenbacher's car.⁷³ These markings were not only peculiar to the plaintiff's car, but they caused some persons to think the car in the advertisement was driven by the plaintiff.⁷⁴

Finally, in *White v. Samsung Electronics America, Inc.*, plaintiff Vanna White was the hostess of "Wheel of Fortune," which is "one of the most popular game shows in television history."⁷⁵ Defendants Samsung Electronics America, Inc., and David Deutsch Associates, Inc., ran advertisements in half a dozen publications for Samsung electronic products "hypothesizing outrageous future outcomes for the cultural items[.]"⁷⁶ One of these advertisements "depicted a robot, dressed in a wig,

68. *Motschenbacher v. R.J. Reynolds Tobacco Company*, 498 F.2d 821, 822 (9th Cir. 1974).

69. *Id.* at 822.

70. *Id.*

71. *Id.* at 822-23.

72. *Id.* at 827.

73. *Id.*

74. *Id.*

75. *White v. Samsung*, 971 F.2d 1395, 1397 (9th Cir. 1992), *as amended* (Aug. 19, 1992).

76. "For example, one lampooned current popular notions of an unhealthy diet by depicting a raw steak with the caption: 'Revealed to be health food. 2010 A.D.' Another depicted irreverent

gown, and jewelry which Deutsch consciously selected to resemble White's hair and dress." The robot was posed, in a stance for which White is famous, next to a game board clearly intended to reflect the Wheel of Fortune game show set. The caption on the advertisement read: "Longest-running game show. 2012 A.D."

After the advertisement was circulated, White sued Samsung and Deutsch in the United States District Court for the Central District of California and brought claims under California's common law and statutory right of publicity, *inter alia*. The district court dismissed both claims on the ground that the robot was not a "likeness" of White within the meaning of Section 3344 and that the defendants had not appropriated White's identity within the meaning of the common law. "Without deciding for all purposes when a caricature or impressionistic resemblance might become a 'likeness,'" the Ninth Circuit agreed that the robot was not White's "likeness" within the meaning of Section 3344. However, the court held that the common law right of publicity's first element is not confined to cases wherein the defendant merely uses the plaintiff's "name or likeness." Rather, the court held, the right can be invoked wherever the defendant has misappropriated the plaintiff's identity. This may occur even where "the individual aspects of the advertisement" do little to indicate the identity of plaintiff. The element is satisfied, at least, where, when all the aspects of the advertisement are viewed together, they leave little doubt that the ad is meant to depict the plaintiff.⁷⁷

These holdings accord with J. Thomas McCarthy, who observed in this regard:

[t]o establish liability, plaintiff need prove no more than that he or she is reasonably identifiable in defendant's use to more than a *de minimis* number of persons. Thus, unlike trademark law, which requires a significant percentage of potential customers be likely to be confused, there should be no particular quantum of people who in fact identified plaintiff from defendant's use. Rather the number

'news'-show host Morton Downey Jr. in front of an American flag with the caption: 'Presidential candidate. 2008 A.D.'" *Id.* at 1396.

77. Samsung and Deutsch sought *en banc* review, but the Ninth Circuit rejected the petition. 989 F.2d 1512 (9th Cir. 1993). Judge Alex Kozinski dissented from the denial, and observed that, under the ruling, the right of publicity would likely extend to "[a] commercial with an astronaut setting foot on the moon . . ." *Id.* at 1515. Although Judge Kozinski's rejection of the Ninth Circuit's holding is a minority view that has never prevailed; his prediction about the right of publicity extending to astronauts was prescient and has proven to be entirely accurate.

of people who can reasonably identify plaintiff goes to the context of the remedy.⁷⁸

Newcombe, *Motschenbacher*, and *White* support the proposition that, where a company misappropriates the photograph of an astronaut in his spacesuit on a mission, the astronaut is nonetheless still “readily identifiable.” Although the astronaut’s face may not be visible in such a photograph, *Newcombe* and *Motschenbacher* explicitly rejected the argument that an individual’s facial feature must be visible in order to satisfy the “readily identifiable” requirement. Rather, the crucial question is whether the photograph would lead some viewers to infer that the astronaut is the one depicted. There is no doubt that the photograph of an astronaut on a mission would lead some viewers to infer the astronaut’s identity. The public is enthralled by missions to space, and follows them closely. Inevitably, photographs taken of astronauts on such missions are widely circulated.⁷⁹ Thus, when such photographs appear in advertisements, many, (if not most) members of the public will recognize the photograph and know whom the astronaut depicted is. Such cases easily surpass the standard set by *Newcombe* wherein the court noted that “family, friends and former teammates” of the plaintiff understood the photograph to reflect the plaintiff, and by *Motschenbacher* where “[s]everal of plaintiff’s affiants” inferred that the photograph was supposed to be of the plaintiff.

Moreover, *White* instructs that the analysis must turn on all aspects of the photograph viewed together. Thus, a photograph of an astronaut walking on the moon instantly informs a viewer that the astronaut must be one of only twelve men.⁸⁰ Similarly, if the photograph displays the astronaut on a Lunar Roving Vehicle, the viewer knows with certainty that the astronaut must be one of only six men — as the lunar rovers were used

78. McCarthy, *supra* note 29, § 3:18; *see also* Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379 (1979) (holding that the fact that the proof might show that only a few people would reasonably identify plaintiff would “not vitiate the existence of a cause of action” but would “affect the quantum of damages.”); Negri v. Schering Corp., 333 F. Supp. 101, 104 (S.D.N.Y. 1971) (“In any event, the number of people who recognized the photograph in the advertisement as Miss Negri, while it may be relevant on the question of damages, is not material on the issue of liability. On that issue the question is whether the figure is recognizable, not the number of people who recognized it.”).

79. *See, e.g., Millennium Moments: Keeping Pace on the Long Road to the Moon*, NAT’L GEOGRAPHIC, Oct. 1999 (observing that the “Visor Shot” is said to be “[n]early as famous as the words uttered on the Moon by astronaut Neil Armstrong.”).

80. *Facts About Spacesuits and Spacewalking*, NASA, <http://www.nasa.gov/audience/foreducators/spacesuits/facts/index.html> (last visited May 27, 2014).

only during the Apollo 15, 16, and 17 missions.⁸¹ Thus, many viewers will recognize who the astronaut is in the photograph the moment they see it.

This conclusion is supported by those decisions addressing claims by astronauts that a company has violated his right of publicity by using a photograph of the astronaut in a space suit in an advertisement or product.

In *Conrad v. Action Products, Inc.*,⁸² the widows of Apollo astronauts Pete Conrad (who commanded the Apollo 12 mission and was the third man to walk on the moon) and Col. James Irwin (an Air Force Colonel and the Apollo 15 lunar module pilot who set the record for the length of time spent on the moon's surface) joined forces with Aldrin in an action against a toy company, Action Products International, Inc. The plaintiffs had learned that Action Products was using photographs of Aldrin and Irwin on the packaging of their space themed toys, as well as Conrad's name on a replica space patch.⁸³ They brought suit in the United States District Court for the Central District of California against Action Products for violating their common law and statutory right of publicity, and postmortem right of publicity, and sought a preliminary injunction enjoining such use.⁸⁴ In its defense at the preliminary injunction stage, Action Products did not dispute that Aldrin and Irwin were the persons inside the spacesuits in the photographs, or that they used those images (or Conrad's name) on their toy packaging and products.⁸⁵ Rather, the company argued that its use of the astronauts' photographs should not be enjoined because the astronauts were not readily identifiable inasmuch as their faces were covered by their space suit visors.⁸⁶

The plaintiffs cited to the *Newcombe* and *Motschenbacher* decisions, *inter alia*, to rebuff Action Products' argument.⁸⁷ Subsequently, United States District Judge David O. Carter issued a tentative order citing *Motschenbacher*, and held that the image, likeness, and identities of the

81. *Lunar Roving Vehicle (LRV)*, SMITHSONIAN NAT'L AIR AND SPACE MUSEUM, <http://airandspace.si.edu/explore-and-learn/topics/apollo/apollo-program/spacecraft/lrv.cfm> (last visited Mar. 2, 2015).

82. *Conrad v. Action Prods. Inc.*, No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000).

83. Mem. of P. & A. in Supp. of Pls.' Nancy Conrad, Dr. Buzz Aldrin, Mary Irwin and Universal Spaceworks, LLC's Mot. for Prelim. Inj., at 9–11, *Conrad v. Action Prods. Inc.*, No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000).

84. *Id.* at 1–2.

85. See Opp'n to Pls.' Mot. for Prelim. Inj., *Conrad v. Action Prods. Inc.*, No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000).

86. *Id.* at 7–10.

87. Reply Mem. of P. & A. in Further Supp. of Pls.' Mot. for Prelim. Inj. 9–11, *Conrad v. Action Prods. Inc.*, No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000).

astronauts were readily identifiable even though their facial features may not have been.⁸⁸ Although Action Products also argued that the plaintiffs should have established through survey data that the general public viewing the toy package would identify the figures as astronauts Aldrin and Irwin, rather than other astronauts, the court disagreed.⁸⁹ The court noted that under *Newcombe*, California's right-of-publicity statute does not require a majority of the general public to be able to identify the person in the photograph, but that family, friends, and former teammates may suffice.⁹⁰

Aldrin v. Unified Precious Metals, Inc.,⁹¹ arose from a licensing agreement between Excelsior Productions, Inc., and World Network, Inc., regarding the endorsement of commemorative coins and plaques relating to the 30th anniversary of Apollo 11.⁹² However, Aldrin terminated the contract after Excelsior and World Network did not make the initial payment and indicated that they would not make minimum guarantee payments.⁹³ Nevertheless, Unified Precious Metals, Inc., doing business as American Historical Society ("AHS"), promoted a medallion featuring the Visor Shot affixed to a pocket watch.⁹⁴ AHS marketed the watch as an Apollo 11 pocket watch which "features the special limited edition Apollo 11 Medallion issued to commemorate the 30th anniversary of man's first landing on the moon."⁹⁵ In response to a cease and desist letter from Aldrin's counsel, AHS denied the misappropriation and countered that the company "[did] not see any name, likeness, image or identity of Aldrin on the Apollo 11 medallion."⁹⁶ Additionally, AHS produced a contract purportedly assigning Excelsior and World Network's prior agreement to AHS.⁹⁷

Aldrin brought suit in the Superior Court of the State of California for the County of Los Angeles against AHS, Excelsior, and World Network.

88. *Conrad v. Action Prods., Inc.*, No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000).

89. *Id.* at 6.

90. *Id.* (Not surprisingly, after the district court issued its tentative order, Action Products settled with Aldrin, Conrad, and Irwin for an undisclosed amount. Pls.' Final Report to the Court re Settlement and Dismissal of Action 2, *Conrad v. Action Prods., Inc.*, No. SA CV 99-1223 DOC (ANx) (C.D. Cal. Jan. 18, 2000).).

91. *Aldrin v. Unified Precious Metals, Inc.*, No. BC 220608 (Cal. Super. Ct. Jan. 21, 2000).

92. Mem. of P. & A. in Supp. of Pl. Dr. Buzz Aldrin's Mot. for Prelim. Inj. 6, *Aldrin v. Unified Precious Metals, Inc.*, No. BC 220608 (Cal. Super. Ct. Jan. 21, 2000).

93. *Id.* at 5.

94. *Id.* at 6-7.

95. *Id.*

96. *Id.* at 6.

97. *Id.* at 6-7.

He alleged violations of his common law and statutory rights of publicity, among other claims. The defendants argued that Aldrin was not readily identifiable in the Visor Shot because his face was not prominently displayed. In response, Aldrin argued that, because the medallion specifically intended to commemorate the Apollo 11 mission to the moon, the image was meant to memorialize an astronaut from that mission, and did not merely represent an empty space suit. Aldrin also pointed out that he had licensed the visor shot image to numerous parties, and that the visor shot had appeared in many magazines, newspapers, history books, and television programs where the image had specifically been identified as depicting Aldrin.⁹⁸

The trial court rejected the defendants' argument and granted, in part, Aldrin's motion for preliminary injunction, ordering defendants to immediately cease and desist further manufacture, advertisement, and sale of any products with Aldrin's name, image, likeness, or identity, including the commemorative medallions, pocket watches, or coin collections without his express written consent.

The precedent is clear: a person can be "readily identifiable" within a photograph even if the person's facial features are not visible. This is so where the photograph, taken as a whole, could lead some viewers to infer that the person was the subject of the photograph. When it comes to photographs of an astronaut in his spacesuit on a mission, this standard can in most cases be easily met. Photographs of astronauts are widely disseminated cultural icons that cannot but be recognized by viewers.

B. The First Amendment and the "Public Interest" Defense

The First Amendment to the United States Constitution may preclude a claim for violation of the right of publicity with respect to the "publication of matters in the public interest"⁹⁹ This is so because the First Amendment requires that the right to be protected from unauthorized publicity "be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press."¹⁰⁰ Indeed, Section 3344(d) specifically excludes from its protection the "use of a name, voice, signature, photograph, or likeness in connection with any

98. Reply Mem. of P. & A. in Supp. of Pl.'s Mot. for Prelim. Inj. 7, *Aldrin v. Unified Precious Metals, Inc.*, No. BC 220608 (Cal. Super. Ct. Jan. 21, 2000).

99. *Montana, Jr. v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 794 (1995).

100. *Gill v. Hearst Publ'g Co.*, 40 Cal. 2d 224, 228 (1953); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 401-02 (2001); *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 401-02 (2001).

news, public affairs, or sports broadcast or account, or any political campaign”

Consequently, companies that misappropriate the identities of astronauts for commercial purposes have argued that, because the events surrounding astronauts are of public interest, any right-of-publicity action is precluded. However, this argument is inconsistent with the precedents addressing the intersection of the First Amendment and the right of publicity. Advertisements are commercial speech entitled to less vigorous First Amendment protections.¹⁰¹ Where a plaintiff’s identity is used for the purpose of soliciting viewers to purchase the defendant’s product, the First Amendment will rarely shield the defendant from the plaintiff’s right-of-publicity claims.¹⁰²

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,¹⁰³ the California Supreme Court recognized that the right of publicity has a “potential for frustrating the fulfillment” of both well-established purposes of the First Amendment — namely, to preserve the market place of ideas and public debate and to respect individual development and self-realization.¹⁰⁴ The court observed that use of a celebrity’s likeness could further “debates about culture and values” and could also be incorporated by individuals into works of individual expression.¹⁰⁵

However, the *Comedy III* court concluded that the First Amendment does not render the right of publicity a nullity. That is, not all expression with respect to celebrities is insulated by the First Amendment.¹⁰⁶ The court quoted Chief Justice Rose Bird’s dissent in *Lugosi v. Universal Pictures*,¹⁰⁷ one of its prior right-of-publicity decisions:

101. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

102. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 396 (2001) (“[B]ecause . . . nonmisleading commercial speech is generally subject to somewhat lesser First Amendment protection, the right of publicity may often trump the right of advertisers to make use of celebrity figures.”).

103. *Id.* at 397.

104. *Id.* at 396–97.

105. *Id.* at 397 (“[T]he very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity’s meaning.”).

106. *Id.* at 399 (“The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility.”).

107. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 834 (1979).

Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one's identity.¹⁰⁸

The court concluded, consequently, "the state's interest in preventing the outright misappropriation of such intellectual property by others is not automatically trumped by the interest in free expression or dissemination of information."¹⁰⁹

To reconcile these competing interests, and enable courts to "distinguish between protected and unprotected expression," the *Comedy III* court looked to the concept of "transformative works" derived from the fair use doctrine in copyright law. That inquiry is part of the "first factor" in the fair use doctrine under Federal Copyright law.¹¹⁰ The court declined to wholly import the fair use doctrine into right-of-publicity jurisprudence. However, the court held that the "transformative" inquiry provides the necessary basis for squaring the right of publicity with the First Amendment. The court summarized the standard thus: the inquiry is "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."¹¹¹ That is, "whether the literal and imitative or the creative elements predominate in the work."¹¹² Under this standard, whether the plaintiff is proceeding under the common law or Section 3344, "depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are *not* protected expression under the First Amendment."¹¹³

The California Supreme Court's holding that the First Amendment has limited applicability in right-of-publicity cases involving simple misappropriation of another's identity primarily for commercial purposes is reinforced by decisions from the federal courts. In *Downing v. Abercrombie & Fitch*,¹¹⁴ an upscale retailer of casual apparel used a

108. *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 399 (2001) (quoting *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 834–35 (1979) (citation omitted)).

109. *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 401 (2001).

110. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994).

111. *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 406 (2001).

112. *Id.* at 407.

113. *Id.* at 400 (emphasis added).

114. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002 (9th Cir. 2001).

photograph of professional surfers as part of advertisements in its magazine of models wearing items from its clothing line. The edition of the magazine in which the photograph appeared contained various articles about surfing, including an interview with a former world surfing champion. The photograph of the surfers appeared on the page immediately following an article about the history of surfing.

The surfers brought claims for violations of California's common law and statutory rights of publicity. Abercrombie defended "on the basis of the First Amendment arguing that the photograph illustrates an article about surfing, a matter in the public interest."¹¹⁵ The district court accepted this argument and granted Abercrombie's motion for summary judgment. On appeal, the Ninth Circuit reversed. The court recognized that the theme of "surfing and surf culture" is "a matter of public interest."¹¹⁶ Nevertheless, the court concluded that the uses of the plaintiffs' photographs did nothing to directly contribute to the magazine's "story about surfing which came within the protected public interest."¹¹⁷ The court held that because the use of the plaintiffs' photographs did "not contribute significantly to a matter of the public interest" and *were primarily "commercial in nature[,]"* the First Amendment did not bar the plaintiffs' right-of-publicity claims.¹¹⁸

Most companies use an astronaut's identity to draw the viewer's attention to the product advertised and to associate, in the viewer's mind, the depicted astronaut with the company's product.¹¹⁹ Thus, the First Amendment should not preclude a right-of-publicity claim unless the product is an expressive work, that is, something that transforms the photograph or name used and contributes to the marketplace of ideas (such as a documentary), or where the advertisement is for such an underlying expressive work.¹²⁰ A review of state and federal decisions in California

115. *Id.* at 1002.

116. *Id.*

117. *Id.*

118. *Id.*; *Id.* at n.2.

119. McCarthy, *supra*, § 4.8.

120. See Charles v. City of Los Angeles, 697 F.3d 1146, 1155 (9th Cir. 2012) ("While lower courts have occasionally used imprecise, overbroad language in describing these exceptions, it is only in the narrow context of this principle that we have recognized that the noncommercial First Amendment status of an underlying expressive work extends to advertisements for that work."); Cher v. Forum Int'l, Ltd., 692 F.2d 634, 639 (9th Cir. 1982) ("Advertising to promote a news medium . . . is not actionable under an appropriation of publicity theory so long as the advertising does not falsely claim that the public figure endorses that news medium."); Browne v. McCain, 611 F. Supp. 2d 1062, 1071 (C.D. Cal. 2009) ("[A] mere finding of 'public interest' alone does not automatically exempt a defendant from liability on a right of publicity claim. . . . [The defendant must show that the use] *itself* is a matter of public interest.").

involving right-of-publicity suits by non-astronaut celebrities demonstrates that the courts understand this to be the rule.¹²¹ As the United States Supreme Court stated in *Zacchini v. Scripps-Howard Broadcasting Co.*: “The Constitution does not prevent [a state] from making a similar choice here [that is, creating a right-of-publicity cause of action] in deciding to protect the entertainer’s incentive in order to encourage the production of this type of work.”¹²²

On three of the four occasions that trial courts have considered this defense in the context of astronauts or space program pilots, the argument has been rejected. In the fourth case, while the court issued a ruling that invoked the correct standard, the opinion appears to have improperly limited the reach of the right of publicity in California.

In *Conrad v. Action Products, Inc.*,¹²³ discussed in detail above, the defendants argued that their use of Conrad’s name and Aldrin and Irwin’s photographs were protected by the First Amendment and Section 3344(d) because Action Products’ goods and advertising related to matters of public interest. In its tentative order, the district court rejected this argument, and held that “[t]he protections of the First Amendment do not bar Plaintiffs from being compensated from commercial exploitation of their names and likenesses.”

Similarly, in *Aldrin v. Unified Precious Metals, Inc.*,¹²⁴ also discussed above, the defendants argued that their use of Aldrin’s image was protected

121. Compare *Winter v. DC Comics*, 30 Cal. 4th 881, 892 (2003) (observing First Amendment precluded right of publicity claim where “defendants essentially sold, and the buyers purchased, DC comics depicting fanciful, creative characters, not pictures of the [plaintiffs].”); *Montana, Jr. v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 797 (1995), *as modified* (May 30, 1995) (finding that the First Amendment barred a right of publicity claim for sale of posters with name and photograph of famous football player where the defendant “sold the posters to advertise the quality and content of its newspaper.”); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 546 (1993) (holding that documentary about surfing is protected by the First Amendment from a right of publicity claim); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 754 (N.D. Cal. 1993) (observing weekly news magazine protected by First Amendment), *with* *Estate of Fuller v. Maxfield & Oberton Holdings, LLC*, 906 F. Supp. 2d 997, 1010 (N.D. Cal. 2012) (“Because Facebook’s publication of Plaintiffs’ ‘Likes’ is alleged to be for commercial advertising purposes and not part of ‘any news, public affairs, or sports broadcast or account, or any political campaign,’ the Court does not find it appropriate to dismiss the claim under the newsworthiness exception provided in § 3344(d).”); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (“While Lew Alcindor’s basketball record may be said to be ‘newsworthy,’ its use is not automatically privileged. GMC used the information in the context of an automobile advertisement, not in a news or sports account. Hence GMC is not protected by section 3344(d).”).

122. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 (1977).

123. See Part III.A, *supra*.

124. See Part III.A, *supra*.

by the First Amendment and the “public interest” doctrine in opposing Aldrin’s motion for a preliminary injunction. Specifically, the defendants argued that, because Aldrin was a major player in the newsworthy event of man’s landing on the moon, the visor shot was a “form of public interest presentation . . . to which statutory and First Amendment protection must be afforded.”¹²⁵ The defendants also argued that, like the visor shot itself, the commemorative memorabilia bearing the visor shot and honoring the thirtieth anniversary of the Apollo 11 mission was a “matter of public interest” that should be afforded statutory and First Amendment protection. In its tentative ruling, however, the trial court granted Aldrin’s motion, necessarily rejecting the defendant’s defense.

In *Yeager v. Cingular Wireless LLC*,¹²⁶ retired Air Force Major General Charles E. “Chuck” Yeager, famous for being the first pilot to exceed the sound barrier¹²⁷ and profiled in Tom Wolfe’s celebrated book about the early space program, *The Right Stuff*,¹²⁸ brought an action against Cingular Wireless for use of his name in a publication entitled, *Cingular Wireless Announces Enhanced Emergency Preparedness Program for 2006 Hurricane Season*.¹²⁹ The Cingular Publication contained information about Cingular’s preparedness for disasters through its emergency preparedness equipment and it also referenced Yeager and his achievement in relation to Cingular’s equipment:

Nearly 60 years ago, the legendary test pilot Chuck Yeager broke the sound barrier and achieved Mach 1. Today, Cingular is breaking another kind of barrier with our MACH 1 and MACH 2 mobile command centers, which will enable us to respond rapidly to hurricanes and minimize their impact on our customers. . .¹³⁰

The Cingular Publication did not include a picture of Yeager, nor did it propose a commercial transaction or offer for sale any specific product or

125. Dem. to Pl.’s Compl. 9, *Aldrin v. Unified Precious Metals, Inc.*, No. BC 220608 (Cal. Super. Ct. Jan. 21, 2000).

126. *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089 (E.D. Cal. 2009).

127. Although Yeager did not go to space, he participated in America’s early flight programs that help establish the basis for America’s subsequent journeys into space. TOM WOLFE, *THE RIGHT STUFF* 44–79 (Farrar, Straus & Giroux, N.Y. 1983). Unsurprisingly, like astronauts, Yeager has found himself compelled to defend his right of publicity against infringement by companies seeking to use his name and image in their advertisements. See 673 F. Supp. 2d 1089 (E.D. Cal. 2009) (recounting various right of publicity suits instituted by Yeager), available at http://www.callawyer.com/Clstory.cfm?eid=911868&wteid=911868_The_Rights_Stuff.

128. Wolfe, *supra* note 127, 44–79.

129. *Yeager*, 673 F. Supp. 2d at 1093–94.

130. *Id.* at 1094.

services. Although the publication was not a traditional product advertisement, Cingular officials admitted that it was designed “to create positive associations in people’s mind with the AT&T brand so they would think highly of the company.”¹³¹

Yeager brought a suit in the United States District Court for the Eastern District of California alleging, *inter alia*, violations of his common law and statutory rights of publicity. Moving both to dismiss and for summary judgment, Cingular attempted to have the claims dismissed on the theory that the publication was protected by the First Amendment because it was not commercial speech and was newsworthy.¹³² The district court rejected the First Amendment defense. First, the court held that a publication designed to suggest that Cingular’s service was specifically capable of dealing with natural disasters and to present Cingular favorably to the public was commercial speech.¹³³ Second, relying on the Ninth Circuit’s ruling in *Downing v. Abercrombie & Fitch*,¹³⁴ the court held that the use of Yeager’s name was not entitled to First Amendment protection in virtue of its newsworthy character because the use of Yeager’s name did not contribute to Cingular’s supposed newsworthy purpose of conveying information regarding disaster preparedness.¹³⁵ Moreover, the court emphasized that Yeager’s name was incorporated into the publication for the purpose of promoting Cingular’s brand.¹³⁶ The court’s rulings constitute a definitive rejection of Cingular’s First Amendment defense, and a jury ultimately found for Yeager and awarded him \$135,000 in damages.¹³⁷

Lastly, in *Aldrin v. Topps Co.*,¹³⁸ defendant Topps Company, Inc., released a set of trading cards containing images of American celebrities, including of various NASA photographs among which was the Visor Shot of Aldrin. Aldrin sued Topps Company for violations of his right of publicity, and Topps Company filed a motion to strike the complaint under California’s anti-SLAPP statute.¹³⁹ The district court held that a package of

131. *Id.* at 1096.

132. *Id.* at 1093; *Yeager v. Cingular Wireless LLC*, 627 F. Supp. 2d 1170, 1172–73 (E.D. Cal. 2008).

133. *Yeager*, 673 F. Supp. 2d at 1098.

134. *Downing*, 265 F.3d 994, 1000 (9th Cir. 2001). *See* Part III.B, *supra*.

135. *Yeager*, 673 F. Supp. 2d at 1089, 1099.

136. *Id.*

137. Jury Verdict at 2, *Yeager v. AT&T Mobility, LLC*, 2012 WL 3247562 (C.D. Cal. 2012).

138. *Aldrin v. Topps Co.* 2011 WL 4500013, at *1 (C.D. Cal. 2011).

139. CAL. CIV. PROC. CODE § 425.16 (West 2011).

cards containing the Visor Shot was protected by the First Amendment because the cards conveyed “information about his historically significant achievements,” and were not advertisements that proposed commercial transactions. The former basis for the ruling — whether or not it is factually correct — is consistent with the rule that the First Amendment protects speech that contributes to an area of public interest. However, the latter basis of the court’s ruling is of questionable validity because the right of publicity protects not just against use of a person’s identity in advertising, but also against the use of a person’s identity in a commercial product.¹⁴⁰ The implicit elevation by the court, in this case, of bubble gum trading cards to the status of newspapers or history books appears to be unique.

In sum, although the use of an astronaut’s identity in a transformative manner or in a media that contributes to a matter of public interest may be protected by the First Amendment, mere misappropriation of an astronaut’s name or likeness for commercial purposes is not.

C. Employees of the Government and Members of the Armed Services

Those who wish to use the names and photographs of astronauts without obtaining consent have contended that astronauts cannot claim the protection of the right of publicity because they are government employees and, in some cases, military personnel.

A government official may have more limited privacy interests “when he holds a position that ‘has such apparent importance that the public has an independent interest’ in his performance, ‘beyond the general public interest in the . . . performance of all government employees.’”¹⁴¹ Consequently, those who hold office would likely face greater obstacles if they were to attempt to assert their rights of publicity.¹⁴² Indeed, in the

140. See CAL. CIV. CODE § 3344(a) (West 2015) (“Any 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, or soliciting purchases of products, merchandise, goods or services*, without such person’s prior consent . . .”) (emphasis added); see also MCCARTHY, *supra*, § 1:26 (noting that the seminal right-of-publicity case, *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), involved the use of a professional baseball player’s image on trading cards included in packages of gum).

141. *Harris v. Maricopa Cnty.* Superior Court, 631 F.3d 963, 977 (9th Cir. 2011) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

142. See MCCARTHY, *supra* note 29, §§ 4:23–25. Still, there is reason to think that even publically elected officials do not entirely forego their right to control the purely commercial exploitation of their name, image, likeness, or identity. One case that received wide-spread media attention pitted California’s then-Governor Arnold Schwarzenegger against an Ohio bobblehead-doll maker, *Ohio Discount Merchandise, Inc.*, in Los Angeles Superior Court. Tyler T. Ochoa, *The Schwarzenegger Bobblehead Case: Introduction and Statement of Facts*, 45 SANTA CLARA

context of defamation law, courts treat public officials differently from other public figures as well as private figures.¹⁴³

Regardless of how courts come down on the question of a public official's ability to assert publicity rights, astronauts are *not* public officials that are elected. Astronauts are merely government employees — either civilian or military. There is no support in law or fact for the proposition that a government employee forfeits any property rights merely because they are public servants paid by taxpayer dollars. Just as a government employee's house or bank account is not forfeited when he or she is placed on the government payroll, an astronaut's property right to control the commercial use of his or her image likewise is not relinquished.¹⁴⁴

Of course, unlike the average government employee, astronauts do have celebrity status in virtue of their involvement in the United States' space program. As such, courts would likely consider astronauts — like other celebrities¹⁴⁵ — to be “public figures” under the law.¹⁴⁶ But celebrities are unquestionably entitled to invoke the right of publicity, as noted above,¹⁴⁷ celebrities initially championed for the right's

L. REV. 547, 547–54 (2005). Governor Schwarzenegger and his licensing company contended that the toy company had violated his right of publicity under California law through the advertising and sale of a bobblehead doll that depicted Schwarzenegger wearing a gray suit, a bandolier of ammunition and an assault rifle. *Id.* at 551–53. Schwarzenegger argued that the doll did not meet the “transformative test” and was simply a commercial exploitation riding on the movie star fame of Schwarzenegger. John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. TIMES, (May 18, 2004), <http://www.nytimes.com/2004/05/18/national/18arnold.html>. The Ohio company contended that Schwarzenegger's name and likeness were in the public domain and, moreover, that the doll was a medium of expression and was “transformative” in that it was not a mere depiction of Schwarzenegger but was a distorted caricature showing both his history as an action movie hero and a politician. *Id.* Ultimately, the two sides settled the lawsuit, allowing Ohio Discount Merchandise Inc. to produce the bobblehead, but without the gun. Ochoa, *supra*. Ohio Discount also agreed to donate a portion of its sales of the upcoming bobblehead doll to Schwarzenegger's nonprofit, Arnold All-Stars after-school program in Los Angeles. *Id.* Similarly, the John F. Kennedy Library Foundation requires “requires permission be obtained for any use of photographs from the Kennedy Family Collection . . . in any type of commercial or non-profit project” and the payment of a license fee for such use. John F. Kennedy Presidential Library and Museum, *Research Services: Copyright Guidance*, (last visited Mar. 2, 2015), <http://www.jfklibrary.org/Research/Research-Services/Copyright-law.aspx>.

143. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (addressing, in the context of an action for libel, “a ‘public figure’ who is not a public official”).

144. Charles J. Harder & Henry L. Self, III, *Schwarzenegger vs. Bobbleheads: The Case for Schwarzenegger*, 45 SANTA CLARA L. REV. 557 (2005).

145. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (noting that a famous actor is a “public figure” under First Amendment jurisprudence).

146. There is no definitive ruling regarding whether astronauts should be classified as “public figures.”

147. See Part I, *supra*.

recognition.¹⁴⁸ Thus, as long as the public figure is not a public official, he or she unquestionably is entitled to the full protections of the right of publicity regardless of the basis of his or her publicity.¹⁴⁹

Moreover, there does not appear to be a basis for treating a member of the Armed Forces differently from other citizens when it comes to publicity rights. An individual does not lose his right to own private property merely because he or she joins the military. To clarify this issue, some states have enacted statutes specifically granting protections to members of the military similar to those provided by the right of publicity.¹⁵⁰ In 2010, California amended Civil Code Section 3344.1 for the purposes of protecting the names of deceased members of the Armed Forces from being misused.¹⁵¹

148. This is not to say that only celebrities have a right of publicity. It is well-established that “both celebrities and noncelebrities have the right to be free from the unauthorized exploitation of their names and likenesses” *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 546 (1993).

149. See, e.g., *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (“We know of no reason why a public figure prominent in religion and civil rights should be entitled to less protection than an exotic dancer or a movie actress. Therefore, we hold that the appropriation of another’s name and likeness . . . is a tort in Georgia, whether the person whose name and likeness is used is a private citizen, entertainer, or as here a public figure who is not a public official.”).

150. See MCCARTHY, *supra* note 29 at § 4:21; OKLA. STAT. ANN. tit. 21, § 839.1A (West 2006) (“Any person, firm, or corporation that uses for the purpose of advertising for the sale of any goods, wares, or merchandise, or for the solicitation of patronage by any business enterprise, the name, portrait, or picture of any service member of the United States Armed Forces, without having obtained, prior or subsequent to such use, the consent of the person, or, if the person is deceased, without the consent of the surviving spouse, personal representatives, or that of a majority of the adult heirs of the deceased, is guilty of a misdemeanor.”); LA. STAT. ANN. § 14:102.21 (2006) (“It shall be unlawful for any person to use for the purpose of advertising for the sale of any goods, wares, or merchandise, or for the solicitation of patronage by any business the name, portrait, or picture of any deceased soldier, without having obtained prior consent to such use by the soldier, or by the closest living relative, by blood or marriage, of the deceased.”); ARIZ. REV. STAT. ANN. § 12-761 (2007) (“The right to control and to choose whether and how to use a soldier’s name, portrait or picture for commercial purposes is recognized as each soldier’s right of publicity. A person is liable for using the name, portrait or picture of any soldier without having obtained prior consent to the use by the soldier or by the soldier’s spouse, immediate family member, trustee if the soldier is a minor or legally designated representative if the person uses the name, portrait or picture for any of the following purposes: (1) Advertising for the sale of any goods, wares or merchandise. (2) Soliciting patronage for any business. (3) Receiving consideration for the sale of any goods, wares or merchandise The rights and remedies provided in this section supplement any other rights and remedies provided by law, including the common law right of privacy.”).

151. MCCARTHY, *supra* note 29 at § 4:21 (“The statute was amended to change the definition of a ‘deceased personality’ to include those whose identity had commercial value at the time of death ‘because of his or her death.’”).

Although sparse, the case law supports this conclusion. In *Yeager*,¹⁵² the district court held that, notwithstanding the fact that the publication did not propose a commercial transaction or offer for sale any specific product or services, the publication was intended to promote Cingular's products.¹⁵³ The use of Yeager's name and identity, then, was designed solely to "attract attention" to defendant's unrelated products and services.¹⁵⁴ The *Yeager* decision stands in clear contradistinction to the claim that astronauts who work for the government or are members of the military do not have a right of publicity.

The argument was also rejected by the trial court in *Aldrin*.¹⁵⁵ The defendants argued that, under this exception, military service personnel and other public servants do not possess a right to publicity claim in images taken of them in the course of conducting a mission made possible by United States taxpayers.¹⁵⁶ However, the court granted the motion for a preliminary injunction, thereby rejecting the defendants' argument.¹⁵⁷

In sum, although a public official's ability to invoke the right of publicity may be limited, astronauts are *not* public officials. Consequently they should be able to invoke the right of publicity as a member of the public, regardless of their status as government employees or members of the armed services.

D. Photographs of Astronauts in Space Are Not in the Public Domain for Purposes of the Right of Publicity

Companies that misappropriate photographs of astronauts have argued that astronauts have no standing to object to their use because NASA has placed the photographs in the public domain. This argument is based on the misperception that the United States government holds all intellectual property rights in the photographs taken by astronauts while on NASA missions, and that the photographs are in the public domain for unfettered use by third persons. However, this is not the case. NASA's Media Usage Guidelines clarify that these photographs "generally are not

152. *Yeager*, 673 F. Supp. 2d at 1096.

153. *Id.* at 1097–98.

154. *Id.* at 1098–99.

155. *Aldrin v. Unified Precious Metals, Inc.*, No. BC 220608 (Cal. Super. Ct. Jan. 21, 2000).

156. Mem. of P. & A. of Defs. Excelsior Productions Inc., World Network Inc., Stephen Gordon, and Peter Paul in Opp'n to Pls.' Mot. for Prelim. Inj. 4, *Aldrin v. Unified Precious Metals, Inc.*, No. BC 220608 (Cal. Super. Ct. Jan. 21, 2000).

157. *Aldrin v. Unified Precious Metals, Inc.*, No. BC 220608 (Cal. Super. Ct. Jan. 21, 2000).

copyrighted.”¹⁵⁸ Further, the guidelines state that if the image includes an identifiable person, permission should be obtained from that person prior to using it for commercial purposes:

If the NASA material is to be used for commercial purposes, especially including advertisements, it must not explicitly or implicitly convey NASA’s endorsement of commercial goods or services. If a NASA image includes an identifiable person, using the image for commercial purposes may infringe that person’s right of privacy or publicity, and permission should be obtained from the person.¹⁵⁹

Similarly, NASA’s Regulations for Advertising Requests provides:

Many NASA images and most film and video footage are in the public domain [and] can be used for advertising purposes. However, there are rules regarding the appearance of astronauts or NASA employees or names in commercial activities. Astronauts or employees who are currently employed by NASA cannot have their likenesses or names displayed on any commercial products, advertisements or commercial product packaging. Astronauts and NASA employees who are retired from the Agency can grant permission for the use of their likenesses or names, but that permission may be subject to a fee. For deceased astronauts or employees, their families must grant permission for use of their images or names.¹⁶⁰

Thus, NASA’s own guidelines undermine any argument against an astronaut’s right-of-publicity claim on the grounds that NASA itself placed the photo in the public domain.

The right of publicity — which protects a person’s identity — is separate and distinct from copyright. Indeed, the courts have overwhelmingly rejected the argument that federal copyright law preempts state right-of-publicity claims because an individual’s “persona” cannot be copyrighted.¹⁶¹ Thus, even if NASA generally does not seek copyright

158. NASA, *Using NASA Imagery and Linking to NASA Web Sites* (last visited Mar. 2, 2015), <http://www.nasa.gov/multimedia/guidelines/index.html#>; cf. 17 U.S.C. § 105 (“Copyright protection under this title is not available for any work of the United States Government . . .”).

159. *Id.*

160. NASA, *NASA Regulations for Advertising Requests* (last visited Mar. 2, 2015), http://www.nasa.gov/audience/formedia/features/Advertising_Guidelines.html.

161. *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (“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 IRPA [Illinois right-of-publicity] claim.”); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001) (finding no preemption “[b]ecause

protection for its photography, there is little reason to believe that this policy would forfeit an astronaut's right of publicity — a separate intellectual property right.¹⁶² Unsurprisingly, the courts have rejected this argument in the context of astronauts.

In *Conrad*,¹⁶³ the defendant argued that NASA had effectively dedicated the mission patch and photographs used in Action Products' goods and packaging to the public domain. In its tentative order, however, the district court noted that NASA's policy indicated that if an image included an identifiable person, using that image of the person for commercial purposes may infringe upon that person's right of publicity, and permission should be obtained from that person prior to using that image. The court observed that "although NASA may have been able to copyright the picture itself or completely release it to the public domain, it has chosen a specific policy preserving the rights of its astronauts to profit from any commercial value their images may have."¹⁶⁴ Thus, the court tentatively held that Plaintiffs had made a preliminary showing that Action Products violated that policy and Plaintiffs' rights of publicity.¹⁶⁵

the subject matter of the Appellants' statutory and common law right of publicity claims is their names and likenesses, which are not copyrightable . . ."); *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623 (6th Cir. 2000) (rejecting preemption argument and noting that if federal copyright law preempted a right of publicity cause of action merely because a copyrighted work were involved, then "state-law rights of publicity would virtually cease to exist."); *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) ("the content of the right protected by the misappropriation tort does not fall into the subject matter of copyright . . ."); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992) ("Waits' voice misappropriation claim, therefore, is not preempted by federal copyright law."); *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Christoff v. Nestle USA, Inc.*, 62 Cal. Rptr. 3d 122, 131–32 (Ct. App. 2007) (noting the differences between the right of publicity and Federal copyright law), *cert. granted*, 169 Cal. 888 (2007), and *modified on reh'g*, 47 Cal. 4th 468 (2009); *KNB Enter. v. Matthews*, 78 Cal. App. 4th 362, 375 (Cal. Ct. App. 2000) ("Accordingly, we conclude the [plaintiffs'] section 3344 claims are not preempted by federal copyright law."); *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 837 (C.D. Cal. 1998) (holding that using the image to advertise is not the same as merely copying it and stating commercial use is an "extra element" that defeats preemption); *see also MCCARTHY*, *supra* note 29 at §§ 11:49–52. Even in the context of astronaut litigation, courts have rejected the argument that federal copyright law preempts a claim for right of publicity. *See Aldrin v. Unified Precious Metals, Inc.*, No. BC 220608, at 7 (Cal. Super. Ct. Jan. 21, 2000) (holding that "since Plaintiffs have merely had their picture taken or name written on a patch, they have not engaged in 'a work of authorship fixed in a tangible medium of expression' and thus lie outside the scope of copyright law." (quoting *Michaels*, 5 F. Supp. 2d at 837)).

162. MCCARTHY, *supra* note 29 at §11:52.

163. *See* Part III.A, *supra*.

164. *Conrad v. Action Prods., Inc.*, No. SA CV 99-1223 DOC (ANx), 7 (C.D. Cal. Jan. 18, 2000).

165. *Id.*

Similarly, in *Aldrin*,¹⁶⁶ the defendants, in opposing Aldrin's motion for a preliminary injunction, argued that Aldrin's image was part of the public domain because it had been sponsored by NASA. The court granted the motion for a preliminary injunction, thereby rejecting the defendants' argument.

Therefore, an astronaut is not precluded from bringing claims for violations of his right of publicity merely because his name or likeness appears on materials produced during NASA missions.

V. Practical Considerations: The Danger of Taking a Right-of-Publicity Case Before a Jury

The authors are unaware of an astronaut's claim for right of publicity ever being decided by a jury. This is unsurprising as there is research to suggest that celebrity defendants may receive preferential treatment throughout the trial process.¹⁶⁷ "In the early stages of a trial, celebrities are afforded the opportunity to present their case to the media which, more often than not, strengthens their case. Through increased accessibility to the media, celebrities are able to appeal to the public's sympathies . . . before trial."¹⁶⁸ Because they have increased accessibility to the media, celebrities can appeal to the public's sympathies and generate bad publicity for the party opposing them.¹⁶⁹ The astronauts of early space exploration enjoyed immense celebrity; ticker tape parades were held in their honor and numerous awards have been bestowed upon them. They are frequently sought after as spokespersons for commercial products. In short, astronauts, especially those from the Mercury, Gemini, and Apollo eras, enjoy extremely high societal regard. Thus, parties building a defense against an astronaut's suit for right of publicity must worry not only about the legal merits of their case, but the positive bias jurors may have towards astronauts.

In addition, a loss at trial can be extremely costly to a defendant in a right-of-publicity suit. Under Sections 3344 and 3344.1, the measure for damages for right-of-publicity infringement, if liability is found, is actual damages or \$750, whichever is greater, any profits attributable to the use

166. *Id.*; See Part III. A, *supra*.

167. Jared Chamberlain et al., *Celebrities in the Courtroom: Legal Responses, Psychological Theory and Empirical Research*, 8 VAND. J. ENT. & TECH. L. 551, 563-64 (2006) (discussing study that found that mock jurors evaluate celebrities "more positively and view them as less responsible" than non-celebrities).

168. *Id.* at 555.

169. *Id.*

and not taken into account in computing actual damages, punitive damages, and attorneys' fees and costs. Since astronauts have a long history of licensing their images and have reached many settlements, including confidential settlements, which could be for significant dollar amounts, expert witnesses would have a documented basis for testimony regarding the damages sustained by an astronaut whose right of publicity has been infringed.

Although no right-of-publicity case involving astronauts has gone to trial, right-of-publicity cases involving non-astronauts have yielded judgments granting substantial damage awards against defendants.¹⁷⁰ For instance, in *DeRita v. Scott*,¹⁷¹ compensatory damages of \$179,275 were granted for the violation of the Three Stooges' right of publicity. The court then granted \$1,000,000 of punitive damages against the infringing party.¹⁷²

Such pragmatic concerns should cause companies to think twice about the prospect of defending an astronaut's right-of-publicity before a jury.

VI. Conclusion

Although Armstrong and Aldrin's first moonwalk took place almost forty-three years ago, the photographs taken that day and others from the various eras of manned space exploration continue to resonate with the public. While the history of that moment does belong to the world, the intellectual property rights associated with any individuals within those photographs belong to those who risked everything including their own lives on behalf of mankind as a whole.

American astronauts now have decades of experience asserting their right of publicity in order to curb misappropriation. They have extensively licensed the use of their images, have negotiated private settlement with infringers, and pursued litigation. The lessons learned are many. A defense asserting that the astronauts are not recognizable based solely on the space suit visor covering their face is unlikely to prevail, especially where the photograph is well known and has a history of licensing activity. And, the First Amendment will rarely protect a company that

170. Robert C. O'Brien & Bela G. Lugosi, *A Picture Is Worth a Thousand Words or Sometimes a Million Dollars: The Commercial Value of Rights of Publicity*, 23 ENT. & SPORTS LAW. 9 (Summer 2005) (listing a variety of right-of-publicity verdicts within California and other states, including \$1,500,000 in compensatory damages plus punitive damages for actor Dustin Hoffman, \$403,000 in damages for Vanna White, \$24,000,000 in damages for a former hockey player, \$7,625,000 in damages for the Beatles).

171. *Id.*

172. *Id.*

misappropriates an astronaut's identity for use in commercial advertising or a commercial product. Nor are astronauts exempt from the right of publicity merely because they are government employees or members of the Armed Forces. Finally, NASA's guidelines for the use of its photographs are not a basis for maintaining that astronauts' images are in the "public domain," such that the astronauts' permission is not required to use the photographs in a commercial context.

The unreported astronaut right-of-publicity disputes and analogous published decisions strongly suggest continued and robust protection for astronauts and their families under right-of-publicity laws. Moreover, pragmatic concerns should weigh heavily against the decision to attempt to defend against an astronaut's right-of-publicity claim before a jury. Prudent companies will make certain to reach a licensing agreement with an astronaut or an astronaut's family before using the astronaut's image for commercial purposes.