The Intent of the Law in Waivers: For the Persona or the "Other" Entity?

Gabrielle Stormo

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THE INTENT OF THE LAW IN WAIVERS:
FOR THE PERSONA OR THE “OTHER” ENTITY?

I. INTRODUCTION

The way one uses his or her persona or likeness is important, especially because as technology expands and the use of it intensifies, there are more ways to manipulate the law in favor of the infringer. When a persona signs a license or agreement granting and excluding certain rights to a producer, manager, or some other entity, what rights does this waive today as opposed to twenty years ago when it was signed? What are the intended consequences of the real-life operation of law?

In this Comment, Part I looks at how copyright and contract law currently strives to evaluate license agreements and analyzes each part of the agreement. Part II analyzes Brown v. Twentieth Century Fox¹ looking at basic contract law based on the overview given in Part I. Part III shows the impact of right of publicity, the First Amendment, and contract law as well as identifies a solution to problems of the law. The article concludes that there should be a stronger form of protection for personas that have waived general rights prior to knowledge of the burgeoning technology. At the same time, the courts should find a reasonable standard analysis to ascertain that the balance of waived rights is fair to both the persona and the entity to whom the persona has licensed exclusive rights.

II. CASE LAW OVERVIEW – THE NEED FOR A CONSISTENT APPROACH IN ANALYZING LICENSING AGREEMENTS

The author of an original work may obtain a copyright in her work as long as certain statutory criteria are met.² Often, it is

beneficial to this copyright owner to assign or license some of the rights associated with holding a copyright. When a copyright holder transfers some or all of the rights in a copyrighted work, the transferee can use the rights obtained to hold others liable for infringing the copyrighted work. Although copyright owners transfer their rights frequently, issues still remain regarding the scope of copyright licenses. What may a transferee do with the work? To what extent can the transferee assume ownership? Answering these questions is difficult despite having the terms in a contract because consistent and swift changes in technology have changed the abilities and behaviors of what can be and is being done with copyrighted works. To add to this frustration, no controlling law has addressed what a copyright holder may do with the work in the event that the licensing agreement does not address a new mode or form of presentation of the work. Some courts address the situation with basic contract law while other courts apply copyright law.

The right of publicity is statutory law instated to protect a person’s name or likeness from unauthorized public exposure. The right of publicity is enforced to protect against unauthorized attempts to commercially, through advertisement or on merchandise, utilize another’s time investment in a person’s individual characteristics: name, likeness, and other recognizable attributes. When celebrities use these things in a unique style and famous nature, they tend to be considered one’s persona. The

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3 17 U.S.C. § 201(d) (1994). The exclusive rights held in conjunction with the copyright are explained in the Copyright Act and include the rights to do and to authorize reproduction of the copyrighted work, to prepare derivative works based on the copyrighted work, distribute copies of the work, and to perform or display the work. 17 U.S.C. § 106 (1994).
4 17 U.S.C. § 201(d) (1994). The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner.
6 Id.
7 Jeffrey Malkan, Stolen Photographs: Personality, Publicity, and Privacy, 75 TEX. L. REV. 779 (1997).
right of publicity is distinguished from the right of privacy, which
presumes that there is something deeper to a person's identity than
that which is socially defined. The right of privacy protects the
person from "unwanted public exposure." The personality is
something to be both protected and shown off — the persona of a
celebrity is something unique and to be shown off, but often it
"deflects attention from the plaintiff's essential self."  

The court recognizes that it needs to be mindful of protecting
personas because overprotecting could limit the amount of speech
and debate in society; rights protected by the First Amendment.
The First Amendment offers the freedom of speech. By granting
a persona too many rights to her likeness or name, society is
restrained in the way it can express ideas or opinions in regard to
that persona. However, persona protection is there to guard
reputation, prevent over-exposure, protect against free-riding and
to prevent consumer confusion. When a party makes an
unauthorized use of the name and likeness of another party, a
claim for misappropriation may arise. In other words, the tort of
misappropriation of name or likeness protects an individual's
persona.

It is important to protect personas because, as Chief Justice Bird
of California wrote in her dissent in Lugosi v. Universal Pictures,"[T]he unauthorized use disrupts the individual's effort to control

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8 Id.
9 Id.
10 Id.
11 U.S. CONST. amend. I.
12 17 U.S.C. §301(a) (1994). All legal or equitable rights that are equivalent to
any of the exclusive rights within the general scope of copyright ... are
governed exclusively by this title. Thereafter, no person is entitled to any such
right or equivalent right in any such work under the common law or statutes of
any State.
13 Brown v. Ames, 201 F.3d 654, 657 (2000). The tort for misappropriation of
name or likeness protects the interest of the individual in the exclusive use of his
own identity, in so far as it is represented by his name or likeness, and in so far
as the use may be of benefit to him or to others. Restatement (Second) of Torts
14 603 P.2d 425 (Cal. 1979).
his public image, and may substantially alter that image." In addition, the persona has commercial value. It has this value because the persona cannot be seen through by the audience; the persona is as it chooses to portray itself to the world. In building up a persona, celebrities or others often spend a great deal of time, labor, and money. To allow this unauthorized use by others is to allow them to take the investment of the persona and dissolve or completely extinguish it through “overexposure and careless exploitation.”

A problem arises in protecting the celebrity persona because it “is both tangible and intangible at the same time.” It is not as tangible as the photographs that are taken of the celebrity, but more tangible than the mere idea of personality. The best way to protect the persona is with the law. This can be done through state right of publicity laws, state misappropriation laws, and recognizing First Amendment rights.

First Amendment rights need to be weighed on behalf of all parties involved in an agreement. The party who is having rights licensed to it has First Amendment rights, as does the party who is waiving those rights. The First Amendment is the right of free speech and is in the Constitution to encourage new ideas and opinions. The right to freedom of speech can weigh in favor and in opposition to the individual party. The allegedly infringing party will often argue its First Amendment rights when trying to defend a use that the plaintiff feels is protected. The First Amendment strongly protects political, informational, and entertainment works. However, the First Amendment does not

15 Id.
16 Malkan, supra note 7, at 835.
17 Id.
18 Id., supra note 7, at 829.
19 Id. at 830.
20 Id. at 832.
21 Id. at 832.
22 U.S. CONST. amend. I.
protect exploitative commercial speech of one’s name and likeness because it does not promote new ideas and opinions.\textsuperscript{24} For example, Julia Roberts could enjoin the use of her photograph in a liquor advertisement without establishing that the association with liquor harms her image. In this respect, the First Amendment protects the persona and not the licensee. Additionally, “the First Amendment does not protect knowingly false speech.”\textsuperscript{25} To recover under this argument, though, the plaintiff would need to show actual malice on the defendant’s part.\textsuperscript{26}

There are a number of ways to promote a persona through unauthorized uses. One of the easiest examples people can relate to is the unauthorized uses of Princess Diana’s name and likeness after her death.\textsuperscript{27} After Diana’s death, many parties produced merchandise commemorative of Diana and also produced sculptures and dolls with Diana’s likeness without the permission of her Estate.\textsuperscript{28} The unauthorized uses by these product merchandisers were alleged to have been “(1) false designation of origin and false endorsement under the Lanham Act; (2) federal trademark dilution in violation of 15 U.S.C. §1125(c); (3) infringement of California’s statutory right of publicity; (4) false advertising under the Lanham Act; and (5) unfair competition and false and misleading advertising in violation of California Business and Professions Code §§ 17200 and 17500.”\textsuperscript{29} While there are many ways to punish unauthorized uses, often the

\textsuperscript{24} Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2001).
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 1186.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 1022. The defendants in this case did not have permission to produce, promote or sell the commemorative merchandise of Diana. Further, the defendants did not have permission to make the items with Diana’s likeness. Diana’s Estate pressed the five issues supra alleging that defendants used the advertising to “improperly benefit from the goodwill associated with Princess Diana’s identity.” Id.
plaintiff will seek injunctive relief and/or damages.  

A. How Courts Determine What Rights Are Waived  

1. Language of the Contract and License Agreements  

Courts typically look to the language of the contract in determining exactly what rights a persona may have waived upon contract signing and how that affects the persona in today’s technology. Courts consider whether the language is broad, they look at the intent of the parties, industry practice, the right of publicity, the rights of the parties, the nature of technology and whether this type of technology was foreseeable. Sometimes courts will consider the sophistication of the parties while keeping in mind who the drafting party was.  

A license is drafted to assign rights from one party to another.  

30 Id. at 1044. 
32 The Copyright Act provides strong guidelines for licenses, but parties typically taper their agreements in line to what they intend or hope to achieve through the agreement. No statute can define a party’s intent, which is why individual agreements are drawn up and why it is necessary to look at contractual language.  
34 Rooney v. Columbia Pictures, 538 F. Supp. 211, 223 (1982). “Under California law, the determination of whether a written contract is ambiguous is a question of law that must be decided by the court.”  
35 Byrnes, supra note 31, at 246. 
36 Id.  
38 Byrnes, supra note 31, at 253. 
39 Id. at 246. 
40 Id. at 247.
The language of the contract is typically drafted in an effort to address all assignments and exclusions involved in the copyrighted work to the licensee. The privileges conveyed in a license agreement are particularly important in the waiving of rights issue. "There is a difference between the parties’ failure to address an existing use, and a use not existing at the time the agreement is made but one the licensee undertakes to exercise control over through exploitation." The difference is in how the court should rule – in favor of the licensee because of the licensor’s oversight of an already existing piece of technology such as a television in 1975, or in favor of the licensor because the VCR was not existent at the time of the agreement and the licensee intends to exercise control over this previously non-existing use.

Next, the court analyzes the extrinsic and plain meaning of the contractual language. Under some state laws, courts take a “permissive approach to extrinsic evidence in contract interpretation.” The extrinsic evidence could move the interpretation of the contractual language forward for the court. However, “if the extrinsic evidence advances an interpretation to which the contract is not reasonably susceptible, the extrinsic evidence is not admissible.” This means that extrinsic evidence is not the only thing that can help interpret the language of the contract. When the language is too broad, the court will typically look to the intent of the parties.

2. Intent of Parties

What the parties intended of the contract is particularly key for the court to look at. The court, while reading the contractual

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42 Id.
45 Id.
language, needs to concentrate on what the parties intended to convey to and receive from each other. The court pays attention to the intent by looking at the language — if the language is very broad or sweeping, the court may not be convinced that the intent was truly there. However, if the language is more specific, it indicates to the court that there was thought in the phraseology, and therefore most likely an intent to convey or not convey a given right.\textsuperscript{46} The court is also willing to look at extrinsic evidence when evaluating the parties’ intent.\textsuperscript{47} However, the court needs to be convinced that the extrinsic evidence promotes an interpretation to which the contract is reasonably susceptible. Otherwise, the evidence is inadmissible.\textsuperscript{48} For example, a party’s offer of extrinsic evidence indicating that no rights to use a photograph without permission were conveyed beyond the first use will be inadmissible if the contract reads, “[y]ou hereby grant to Producer the sole and exclusive right to photograph or otherwise reproduce...and perpetually and throughout the world exhibit....”\textsuperscript{49} This is because the court will deem the contract not reasonably susceptible to such an interpretation.

3. Right of Publicity

Courts will also look at a person’s right of publicity to determine their contractual rights. It is generally accepted that upon entry into the public eye by virtue of his or her creative work, the performer subsequently relinquishes all rights that would otherwise protect him or her.\textsuperscript{50} A performer’s persona—her body, voice and face—defines her value in the market place.\textsuperscript{51} Over

\textsuperscript{46} Brown v. Twentieth Century Fox, 799 F. Supp. 166, 170 (1992). Here, the court decided that because the Agreement expressly permitted “the reproduction and license to reproduce a ‘portion’ of the performance”, it was indicative of the parties anticipating later use of the performance as parts of bigger projects. \textit{Id.}

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id.} at 169.

\textsuperscript{50} Richard Masur, \textit{The Right of Publicity from the Performer’s Point of View}, 10 DePaul-LCA J. ART & ENT. L. 253, 253 (2000).

\textsuperscript{51} \textit{Id.} at 254.
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twenty state jurisdictions recognize some form of right of publicity, either through common law or statute. To prevail in a right of publicity suit, a plaintiff must prove that: (1) the defendant misappropriated the plaintiff’s name or likeness for the value associated with it and not in an incidental manner or for a newsworthy purpose; (2) the plaintiff can be identified from the publication; and (3) the defendant derived some advantage or benefit.

The nature of the technology at issue and whether or not this technology was a foreseeable use are generally considered in a right of publicity suit as well. Some courts decide that the language of the contract encompasses new forms of media despite the distinct differences and the lack of foreseeing the medium. Meanwhile, other courts find copyright terms do not include new uses and focus on the technological distinctions between the form of media identified in the contract and the new media. Courts have come to different conclusions regarding the foreseeability of the same technology, such as television and videotapes. The court found that “though videocassettes may be exhibited by using a television monitor, it does not follow that, for copyright purposes, playing videocassettes constitutes ‘exhibition by television’ as is written in the contract language.” However, in Brown v. Twentieth Century Fox, the contractual language was held to be broad enough to be fairly read to include release on

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52 Id. at 255.
54 Byrnes, supra note 31, at 247.
55 Chambers, 123 F. Supp. 2d at 198. (Members of musical groups made recordings in the 1950’s and ‘60’s for defendant in the form of vinyl records. Defendant made digital recordings to put on internet and plaintiff brought action under copyright law. Court decided the contractual language included all recordings, in favor of defendant.)
56 Cohen, 845 F.2d at 851. (Whether a license conferring the right to exhibit a film “by means of television” includes the right to distribute videocassettes of the film. The court held that it did not.)
57 Id. at 853-854.
58 Id. at 851.
59 Id. at 853.
videocassettes despite their non-existence at the time the agreement was made.\footnote{Id. at 171.}

Courts rely on future technology clauses, such as “by any means now known or hereafter developed,” because they often show the intent of the parties while entering into the agreement.\footnote{Byrnes, supra note 31, at 248.} Courts have also looked at actors’ and performers’ agreements without future technology clauses and decided that they were written broadly enough to encompass television and movie distribution.\footnote{See Brown, 799 F. Supp. at 166.} Brown is a good example of this.\footnote{799 F. Supp. 166 (1992).} The court in Brown reviewed the contractual language, determining that the writing was developed sufficiently to distinguish the parties’ intents despite the lack of a future technology clause.

\section*{III. BROWN V. TWENTIETH CENTURY FOX\textsuperscript{65}}

In Brown, the plaintiff, an entertainer, sued the defendant movie distributor, Twentieth Century Fox, (“Fox”), after Fox used part of well-known singer and songwriter James Brown’s television performance in its movie.\footnote{Id. at 168.} The defendants are the owners/distributors of the successful motion picture “The Commitments,” which was released in 1991.\footnote{Brown v. Twentieth Century Fox, 799 F. Supp. 166 (1992).} The film is about a group of Irish men and women that form a soul music band.\footnote{Id. at 168.} The music band’s leader does his best to instruct the music group on what it takes to be successful soul music performers.\footnote{Brown, 799 F. Supp. at 168.} In doing this, the leader shows the group a videotape of Brown’s performance of the song “Please, Please, Please.”\footnote{Id.} This performance comes from Brown’s appearance on the TAMI show
in 1965. 71 Seven separate cuts of the performance are shown in "The Commitments," totaling 27 seconds of background and entire screen shots. 72 The plaintiff’s name is not mentioned during the brief scene, but is mentioned later in the film when the leader urges the band members to tune into the great soul performers, including Brown by saying: "I want you on a strict diet of soul. James Brown for the growls...." 73 "In addition, the soundtrack from the clip, without the accompanying video, is played as background for a total of one minute twenty-two seconds, although during much of this time it is nearly inaudible." 74

On October 22, 1964, before rehearsal for the TAMI Show performance, Brown "entered into a letter agreement with the producer of the TAMI Show." 75 "This agreement granted ‘sole and exclusive’ rights to the producer to ... use and display, and to license or permit others to use and display, your name and likeness for advertising of publicizing the Performance in conjunction with the Theatrofilm provided, however, ... that Producer shall not have the right to utilize your name, voice or likeness in connection with any so-called ‘commercial tie-ups.’" 76

"In December 1984, the Producer transferred all of its interests, including its rights in plaintiff’s TAMI Show performance, to Screen Entertainment." 77 Screen Entertainment subsequently granted to "dick clark” teleshows, inc. a limited transfer of the copyright for movie theater release. 78 After a series of transfers, defendant, Beacon Communications acquired the right to use "no more than 2 minutes of the song ‘Please, Please, Please’ by James Brown from the TAMI Show" 79 for all "theatrical, non-theatrical, videocassette and videodisc" 80 uses throughout the world. 81

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71 Id.
72 Id.
73 Id.
74 Brown, 799 F. Supp. at 168.
75 Id.
77 Id.
78 Id.
79 Id.
80 Id.
81
Beacon also obtained the television rights to the TAMI Show from “dick clark” media archives as well as the right to use the musical composition and lyrics of the song “Please, Please, Please” from the entities to whom Brown had transferred the copyright in 1956.82

“Brown argued that the 1964 letter Agreement was ambiguous with regard to whether the grant of rights included the right to use his performance in films, film promotions and videocassettes.”83 Brown further argued that the intent of the parties was consistent with his narrow interpretation of the contractual language.84 The court held that as a matter of law the contractual language for transfer was broad in part, but also specific in part,85 thereby indicating all other uses not specifically prohibited are to the grantee.86

Paragraph 4(A), The Grant of Rights, of the agreement reads:

A. You hereby grant to Producer the sole and exclusive right to photograph or otherwise reproduce in connection with the Theatrofilm87 all or any part of your acts, poses, plays and appearances of every kind and nature made or done by you in connection with the Performances and/or your services hereunder; and all instrumental, musical or other sound effects produced by you in connection with the Performances and/or your

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82 Id.
83 Id.
84 Id. at 170.
85 The drafter of this contract was very specific in section 4(B) in reference to a not allowing “commercial tie-ups,” yet was not specific in section 4(A), where it used “sweeping language.” Id. at 171.
86 Id.
87 In the contract, see supra note 4, which states, “The term “Theatrofilm” was introduced and defined in a prior portion of the latter agreement as follows: This letter, when accepted by you, will confirm your employment by the undersigned (the “Producer”) to render your musical performing services in connection with the production of a Theatrofilm photoplay of a teenage music show (the “Theatrofilm”).
services hereunder; to reproduce, re-record and transmit the same in connection with the Theatrofilm in conjunction with such acts, poses, plays and appearances, and perpetually and throughout the world to exhibit, transmit, reproduce, distribute, broadcast and exploit, and license or permit others to exhibit, transmit, reproduce, distribute, broadcast and exploit, any or all of such photographs, reproductions and recordations in connection with all or any portion of the Theatrofilm, or the advertising or exploitation thereof, in and by all media and means whatsoever.

B. Producer shall have the right throughout the world to use and display, and to license or permit others to use and display, your name and likeness for advertising of publicizing the Performance in conjunction with the Theatrofilm provided, however, that Producer shall not have the right to utilize your name, voice or likeness in connection with any so-called “commercial tie-ups.” Without limiting the generality of the foregoing, Producer shall have the right to use your name and likeness in the Theatrofilm and issued in connection with the advertising and exploitation thereof.88

Brown next argued “that the grant of rights in paragraph 4(A) of the agreement cannot be read to encompass the right to the videocassette market, since it was not specified nor even in existence at the time of the 1964 Agreement.”89 The court recognized that in this case there is no contractual language limiting the use of the performance to a specific medium, but would have accepted the argument had the contractual language

89 Id. at 171.
been in the Agreement.\textsuperscript{90}

Brown continued by arguing that the language in the transfers to Beacon obliged it to secure Brown's consent to use of the clip in the film.\textsuperscript{91} The court found that this consent was neither required nor necessary based on the provision.\textsuperscript{92} The provision only "obliges Beacon to secure all required rights and pay all necessary fees."\textsuperscript{93}

Subsequently, Brown argued that the defendant's use of his name, likeness and persona violated his "right of publicity."\textsuperscript{94} The court, again, held for the defendant, explaining that because Beacon had lawfully acquired the right to use the TAMI Show performance, the alleged violation of the right of publicity cannot be based on their use of that performance.\textsuperscript{95} Putting the performance aside, the only use of Brown's "persona" was a single mention of his name along with the names of other entertainers as an exemplar soul performer whom the band members should study.\textsuperscript{96} The court did not find that this was the type of commercial appropriation that has been previously recognized as constituting a right-of-publicity claim.\textsuperscript{97} Even though the defendants used the TAMI Show clip in its advertisements and promotional trailers, since the defendants had a licensed right to use the clip, it did not constitute a right-of-publicity claim.\textsuperscript{98} The plaintiff gave no other allegation that Brown's name or any aspect of his persona except his appearance in the TAMI Show clip was used by defendants to promote the product.\textsuperscript{99}

In summary, the defendant sought summary judgment pursuant

\textsuperscript{90} Id.
\textsuperscript{91} Id. at 172.
\textsuperscript{92} Id.
\textsuperscript{93} Brown, 799 F. Supp. at 172.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{99} Id. at 172.
The court granted the motion for summary judgment, holding that Brown had granted Fox’s predecessor-in-interest rights to use Brown’s image except for commercial endorsements. Brown’s interpretation of agreement – that Fox’s predecessor could rebroadcast the television show on which Brown appeared and could use that performance to advertise the show, but could not reproduce or license the reproduction of Brown’s performance itself – was untenable, given the language of the licensing agreement. The prohibition on commercial endorsements did not apply because Fox exhibited Brown’s performance as something that should be emulated by its movie’s characters.

IV. ANALYSIS

In his complaint, plaintiff Brown alleged violations of the Copyright Act, the Lanham Act, and several related common law causes of action including unfair competition and violation of the right of publicity. Beginning with the right of publicity, the reader can surmise that James Brown has established his persona in the music industry. That established, one can proceed by evaluating the contractual agreement, supra, between Brown and the TAMI Show producer.

The court looked at the rights that Brown waived in his Agreement with the Producer and determined that Brown had granted interest in his rights to use Brown’s image except for commercial endorsements. Brown’s interpretation of the agreement, however, was that Fox’s predecessor could rebroadcast the television show on which Brown appeared and could use that performance to advertise the show, but could not reproduce or license the reproduction of Brown’s performance itself. The court definitely focused on the expressed contractual language in

\[100\] Id. at 168. See FED. R. CIV. P. 56(c).
\[102\] Id.
\[103\] Id. On appeal, the court’s decision was affirmed without opinion in 1994.
\[104\] Id. at 168.
making its determination. Focus on such language is a trend that can be found in other districts as well. For example, in the Southern District of New York, a court found in fifteen different contracts with various film producers, that the plaintiff Mickey Rooney had waived his rights for the numerous films he had acted in by signing the contractual agreement allowing the various producers to exploit the films in the ways that Rooney was contesting. The contractual language in Brown, just as in Rooney, was broad enough for the court to determine that the plaintiff had waived his right to the updated media form and had “consciously” signed away his right to dispute this. To the court, in both cases, the language of the contract was clear and the defendant had won. Terms such as “the artist expressly gives and grants to the producer...” indicate that rights are being conveyed to the producer. The contract requires an exclusionary clause for those rights that the copyright holder/persona does not wish to assign. Otherwise, the contractual language needs to be broad in its entirety so that the court can determine overbreadth and allow the plaintiff to maintain his rights.

Looking at the language of the contract, one can distinguish how this will affect a persona in today’s technology. In situations such as the above mentioned, the persona unquestionably (to the court) licensed rights to the use of his image in some capacities and he no longer had control over the use. The question is whether the person foresaw the new medium that was used when signing the Agreement. The question became an issue in these cases due to new technology. There were no “future technology clauses” per se written in either of the above cases, but the court managed to apply the general language to the benefit of the defendant.

The court looked at the contractual language in addressing the intent of the parties when forming the Agreement. Brown argued that his narrow interpretation of the contractual language was consistent with the parties’ intent. In California, the courts are

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105 Rooney, 538 F. Supp. 211.
107 Id. at 170.
willing to look at extrinsic evidence in interpreting a contract.\textsuperscript{108} This court did not find the extrinsic evidence offered by Brown to be “reasonably susceptible to the interpretation suggested ....”\textsuperscript{109} Brown introduced information in regard to “industry practice” which illustrated his perspective that the industry practice is to get the consent of both the performer and the copyright holder when using “clips.”\textsuperscript{110} Unfortunately for Brown, because the language of the Agreement was so broad, it is difficult for the court to find exacting evidence that the intent of the parties was in-fact to follow “industry practice.”\textsuperscript{111}

The court in Brown did not find that Brown’s right of publicity had been interfered with.\textsuperscript{112} Brown had argued that the clause regarding “commercial tie-ups” had been written in to prevent his name and likeness from being used in the way that it had been in this movie.\textsuperscript{113} The court, however, recognized no true definition to the term “commercial tie-ups” and could only infer based on another comment from Brown that it was to be applied to commercial endorsements for such things as “tobacco, cigarettes, pornography or other unauthorized uses.”\textsuperscript{114} The court could not understand how defendant’s use of the TAMI Show performance violated Brown’s right of publicity, particularly since the defendant had licensed rights to use the performance.\textsuperscript{115} The only right of publicity violation this court could potentially find, was the single use of Brown’s name mentioned with a number of other entertainers.\textsuperscript{116} The court did not perceive this to be the type of appropriation that gives rise to a right-of-publicity claim.\textsuperscript{117} Alternatively, other courts have found that unauthorized telecast of an entire performance on a news broadcast does constitute

\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 171.
\textsuperscript{111} Brown, 799 F. Supp. at 171.
\textsuperscript{112} Id. at 171-172.
\textsuperscript{113} Id. at 171.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Brown, 799 F. Supp. at 171.
\textsuperscript{117} Id.
misappropriation. Since this was not the case here, the court did not find in favor of the plaintiff.

The court did not find that the defendant had used Brown’s clips to promote its product in any way. The plaintiff’s argument may be what is wrong here, rather than the court’s holding. Brown did not argue, and was therefore unable to prove, the three points articulated supra that a court will be looking for in a prevailing right of publicity suit: 1) that the defendant misappropriated the plaintiff’s name or likeness for the value associated with it and not in an incidental manner or for a newsworthy purpose; 2) the plaintiff can be identified from the publication; and 3) the defendant derived some advantage or benefit. This test pursues a balance between the freedom of expression on the defendant’s part and the rights of the plaintiff.

The court in Brown recognized that a carefully drafted license agreement could cover all rights to future invented uses while expressly reserving or transferring all rights not mentioned. This still does not address the previously written agreements though. Not yet used by many courts is a “practical approach” proposed by Neil Nagano. It has three equal considerations based on fairness: “1) who should benefit from the gain associated with the new use, 2) whether the equities weigh in favor of one party over the other, and 3) what outcome is dictated by policies underlying the idea of copyright protection.” The court should have used this approach because it is a reasonable standard based on fairness, and the pursuit of fairness is the reason for the justice system.

V. IMPACT

The impact of this court’s opinion on the current state of the law is such that courts have taken a stringent view on contractual language. This court opined that the plaintiff really did not have a case in arguing violations of the Copyright Act, Lanham Act and

\[118 Id. \]
\[119 Id. at 172. \]
\[120 Brown v. Ames, 201 F.3d 657-658. \]
\[121 Nakos, supra note 41, at 453. \]
causes of action of unfair competition and violation of the right of publicity because the language of his Agreement showed he had conveyed these rights. To have received a more favorable outcome, the plaintiff should have used a different argument, such as the three points supra that need to be proven in a right of publicity suit.

This case does not address the issue of fairness. As a result of this court’s opinion, and other courts who have followed it, there are situations that are not addressable by the law, which involve weighing what is fair. With the precedent Brown has set, the impact is such that the court will now carry a very strong focus on the contractual language while evaluating other things such as right of publicity, persona’s rights, etc. More often than not, this will be exactly where the court needs to look in resolving questions involving the aforementioned issues. However, what about the situation such as Madonna’s where the potential plaintiff has signed her rights to a manager, photographer, or another over 20 years ago; before she had developed her “persona”? After those 20 years, a right she has waived comes to haunt her. The manager, photographer, or another uses the rights after 20 years in a way that she does not advocate. She does not even have a commercial exploitation claim because she has signed away her right. Is there no recourse for such a situation? The harshness of the court here would say “no.” If a faulty contract is written, should there be a way out? The court has made up its rules in an effort to prevent “bad” contracts from being drafted anymore, but when they were written so long ago and the contractual language provides no recourse, potential plaintiffs are often just stuck with their lot.

VI. CONCLUSION

There should be a stronger form of protection for the persona who has waived general rights before realizing new technology. We are now in an age where we recognize that we cannot fathom what will be invented next. Many years ago that understanding did not exist as it does today. This is primarily true because
today's society has been able to watch technology develop. For those who were unable to foresee such evolution while waiving their interests in contractual agreements, there should be some kind of recourse.

The courts have done a great job in addressing future technology issues with the rights of the persona and its contractual rights. In essence, the courts are teaching drafters of licensing agreements to be very careful in what they write. For best protection of one's rights, the current trend appears to be that parties write very vague and broad contracts in order to skirt the issues brought by not yet existing technology.  

Brown appears to be an example for future cases in order to encourage both less vague and also less precise contractual language when drafting agreements. The issue in Brown was that the Agreement contained both broad and specific language; thereby allowing the court and the defendant to interpret the Agreement as it did. The court has done an excellent job of working on eliminating foreseeable problems with licensing in the area of technology and contracts. However, it still does not address the past agreements beyond looking at contractual language.

The court knows that while weighing the rights of the author, it is still necessary to recognize the importance of the First Amendment. Society needs the freedom to express as well as the freedom, as an audience, to appreciate the author's works. At the same time, the persona has rights and it is necessary to have a balance between all these individual rights. The right of publicity has not been held to outweigh the value of free speech. The problem is that there are many uses addressed by the right of publicity that are arguably justified by the First Amendment.

Fairness seems to be the best approach for the courts to pursue. The most suitable rule is that all uses not existing at the time a license agreement is drafted should be held by the licensor unless otherwise addressed within the agreement.  

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122 Stacey M. Byrnes, supra note 31 at 282.
124 Nakos, supra note 41, at 461.
something is not written in the contract, one’s chances of protection over a given issue is slimmer than if it is addressed.

The court should look at Nagano’s fairness test or find another test to find a reasonable standard analysis capable of ensuring the balance of the waived rights is fair to both the persona and the entity to whom the persona has licensed exclusive rights.

Gabrielle Stormo