UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NO. 11-56082

SHIRLEY JONES, on behalf of
herself and All Others Similarly Situated

Plaintiffs-Appellants,

v.

CORBIS CORPORATION,

Defendant-Appellee.

On Appeal from the United States
District Court for the Central District of California
Case No. 10-cv-08668-SVW

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

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Pursuant to Federal Rule of Appellate Procedure 29(b), Screen Actors Guild, Inc. ("SAG") and American Federation of Television & Radio Artists, AFL-CIO (collectively "Amici") respectfully request leave to file their concurrently lodged *Amicus Curiae* brief in the above-entitled case in support of Plaintiff-Appellant Shirley Jones.

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

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

Additionally, Amici provide practical insight into various aspects of red carpet affairs. Amici are uniquely situated to provide such insight as both a

representative of actors and, in the case of SAG, as a sponsor of its own award show, the Screen Actors Guild Awards.

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

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

DATE: December 12, 2011

Respectfully submitted,

By: /s/ Duncan Crabtree-Ireland
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CORPORATE DISCLOSURE STATEMENT

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

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

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

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

INTEREST OF THE AMICI

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

SAG and AFTRA have long fought to preserve the rights of performers and others in their personas, including through nationwide legislative efforts. They strongly supported the enactment of and amendments to California's right-of-publicity statute, Civil Code Section 3344, as well as its companion statute protecting publicity rights of deceased individuals, Civil Code Section 3344.1. SAG and AFTRA have also filed amicus briefs in other right-of-publicity cases, including the companion case of *Alberghetti et al. v. Corbis*, case numbers 10-

56400 and 10-56311, as well as *Keller v. Electronic Arts*, case number 10-15387 also before this court.

In addition, SAG, sponsors an annual award show – the Screen Actors Guild Awards ("SAG Awards") – that honors outstanding performances by actors in film and television. Like most televised award shows, a centerpiece of the SAG Awards is the honorees' arrival on the red carpet where they are greeted by bleachers full of fans, television interviews, and media photographers such as those whose works are distributed by Corbis.

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

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

SUMMARY OF ARGUMENT

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

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

The holding of this case, although accompanied by a caveat that it is not intended to restrict the right of publicity, has significant potential to do just that. The court notes that the opinion is limited to the display of images for purposes of distributing them. What the court fails to note is that, in distributing the photographs for use in advertisements, for example, and without limiting their

distribution to use for purposes such as news reporting or other public interests, Corbis has turned the photographs into products in and of themselves. And in advertising and distributing that product, and making it available for purchase, Corbis violates Ms. Jones' right of publicity and the rights of publicity of countless other individuals.

The court also concludes that Plaintiff consented to distribution by virtue of walking down the red carpet, posing for photographers and having knowledge that those photographers would distribute the photographs. But the court overlooks the uniqueness of red carpet events, the manner by which photographers gain access to them, and the contractual restrictions that are often placed upon the photographers' exploitation of their own photographs. Further, the reasonable expectation an individual possesses, that photographs taken of him or her on a red carpet will not be commercially exploited and will be used solely in connection with the event, news reporting and other matters of public interest, should not be overlooked.

Although Corbis' claim that Ms. Jones' right of publicity is preempted by the United States Copyright Act was not addressed in the district court's opinion, examining the balance between the two rights is important to gain a full understanding of this case. Because Ms. Jones' persona is not an "original work of authorship" that is "fixed in a tangible medium of expression", itis not within the subject matter of the Copyright Act. Accordingly, Plaintiff's rights are not

preempted and must be balanced against the photographer's. In this type of situation, it is the photographer's rights that must be tempered based upon the manner and the location in which the photographs were taken and Ms. Jones' expectations for their use.

The district court also did not address the arguments advanced by Corbis based upon California's statutory public affairs defense and the First Amendment. Although these defenses would fail in this situation, the concepts are also important to understanding the scope of consent granted by Ms. Jones, or any red carpet event attendee. Photographers are invited to attend red carpet events to capture images that are newsworthy or appeal to the public interest, so event attendees willingly pose for photographers. The public affairs defense and the First Amendment may generally protect even Corbis' sale of the photographs where they serve those purposes. However, these defenses do not extend to the commercial sale of photographs to third parties whose intended uses do not fall within the scope of either defense, particularly when those uses would violate the depicted individual's right of publicity.

The district court's ruling opens up a dangerous loophole that would allow the commercial sale of photographs whose primary value comes from the depicted individual's persona. In doing so, it could open a floodgate that threatens to wipe away the protections inherent in the right of publicity.

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Individuals like Ms. Jones Have a Reasonable Expectation That Red Carpet and Behind-the-Scene Photographs Will Be Used Solely in Connection With Legitimate Reports on the Event

The photographs at issue in the instant matter are primarily photographs taken on the red carpet or backstage at various events. Red carpets at award shows, movie premiers and other similar functions are unique experiences in and of themselves. Generally, the attendees will enter at one end of the red carpet which is lined on one side by "step-and-repeat" backgrounds bearing the names and/or logos such as those of the event, its organizer(s), and its sponsor(s). On the other side, photographers and other media seek opportunities for photographs and interviews as applicable. Photographers are limited to assigned areas and, frequently, to specifically assigned spaces within those areas. The atmosphere and

lighting are controlled by the event organizer and the attendees' appearance on the red carpet is determined at the discretion of the event organizer and the various individuals who guide the attendees on their path.

It is true that individuals walking the red carpets at these events are fully aware of the presence of photographers and, in fact, pose for the kinds of photographs at issue herein. They do so with the understanding that these photographs will be used to report on the event and other items of interest attendant to the events, such as fashion commentary. These are matters of long-standing industry custom and practice. There is no expectation, however, that the photographers or their representatives will engage in the commercial sale of the photographs beyond those sales that are related to legitimate news reporting and matters of public interest.

Despite their appearance, red carpets are not public forums; they are carefully controlled environments with very strict security. In order to gain access to the red carpets or interiors of events and award shows, photographers typically must receive a credential from the event organizers. While the process for obtaining the credentials varies from event to event, typically, the photographer or the organization for which the photographer is working must apply for the credential, with approval subject to the event organizer's sole discretion. As part of that process, the photographer or organization must execute a contract by which

they expressly acknowledge that they are being credentialed for limited purposes and may agree, notwithstanding copyright ownership, to limitations on their right to exploit their event photographs. Generally, they are contractually granted access for and agree to limit use of the photographs to purposes such as "legitimate news reporting purposes."[1]

For example, the Media Coverage Agreement for the 13th Annual Screen Actors Guild Awards in 2007, the year in which Ms. Jones was nominated, included the following language: "SAG will provide credential(s) necessary for you to gain access to press areas for the sole and exclusive purpose of providing legitimate news reporting of the SAG Awards." Additionally, it provides that "[t]he sale or distribution of any clips and/or stills from the SAG Awards or any SAG Awards event (e.g. nomination ceremony, behind-the-scenes, Question & Answer sessions, rehearsals, Red Carpet Arrivals) for any non-news reporting purpose or sale to the general public is strictly prohibited." "Stills," as used in the agreement are defined, in pertinent part, as "any still photograph (whether on film or digitally captured) taken in connection with the SAG Awards." A review of the photographs taken of Ms. Jones at the 13th Annual SAG Awards and posted for

[1] Attendees, including the fans who are fortunate enough to gain tickets to the bleachers lining the red carpet, must contractually agree to even more significant restrictions on their use of their own photographs from the event.

sale on Corbis' website reveals that, despite a myriad of other restrictions, Corbis has not restricted the sale or use of the images.[2]

Subsequent revisions to the SAG Awards Media Coverage Agreement have added additional restrictions. For example, the Media Coverage Agreement for the

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[2] Both images include only the following restrictions:

- "Content may not be substantially altered without pre-approval from provider.
- Not available for use by or for competing agencies of Reuters NewMedia, Inc. (see Legal for list of agencies).
- May not credit Reuters for commercial, political, or advertising usage.
- Reuters images are available for use or license in the U.S.A., U.K., Germany and Canada only.
- Not available for distribution, sale, or license by Corbis' international representatives.
- Not available for consumer end-use licensing in the mobile phone industry."

When one selects the "Price Image" option, it opens a pop-up window with various licensing options under the categories "Quick Licenses" or "Custom Licenses." Included among the Quick License options are advertising purposes, such as "Print Ad," "Indoor Display Small" and "Outdoor Display Small." Additionally, under "Custom Licenses," an "All Marketing Pack" option includes:

> "Unlimited Marketing use in the territory and duration you select. This includes all use types within the 'Advertising - Print, Display and TV', 'Brochure and Direct Marketing', 'Internal Communication' and 'Online Advertising' categories. For exclusive rights, please contact your Account Executive."

See, e.g., http://www.corbisimages.com/stock-photo/rights-managed/42-17849267/usa-13th-annual-screen-actors-guild-awards?popup=1# (last visited December 12, 2011) and http://www.corbisimages.com/stock-photo/rights-managed/42-17849442/usa-13th-annual-screen-actors-guild-awards?popup=1# (last visited December 12, 2011).

18th Annual SAG Awards, to be held January 29, 2012[3], includes the following restriction:

> "5. Restrictions on Use of Clips, Recordings, Still and SAG Stills.
>
> (a) You expressly agree, irrespective of copyright ownership…
>
> (3) not to sell, distribute, license, or otherwise transfer any Stills or Recordings from the SAG Awards or any SAG Awards event (e.g. nomination ceremony, behind-the-scenes, Question & Answer sessions, rehearsals, Red Carpet Arrivals) for any purpose other than legitimate news reporting purposes and that the sale of Stills or Recordings to the general public is strictly prohibited;
>
> (4) you will not permit any other person or entity to make use of any Clips, Recordings, Stills and/or SAG Stills in any manner that violates this Section…
>
> …
>
> (c) You agree that any transfer of rights (including, but not limited to, any sale or license) in any Clips, Recordings, Stills or SAG Stills shall be subject to the terms of this Agreement, generally, and this Section 7[sic], specifically, and that you will clearly inform any transferee of the restrictions set forth herein. "

As it has in the past, Corbis applied for a credential for the 18th Annual SAG Awards, agreeing to the Media Coverage Agreement in the application process.

These restrictions on both access to the red carpets and use of the photographs taken on the red carpets are necessary to create a safe and comfortable environment for the event's attendees and also help to ensure that the integrity of the events is not tarnished. The glitz and glamour of Hollywood red carpets are a

[3] The full Media Coverage Agreement for the 18th Annual SAG Awards is available at http://www.sagawards.org/media-pr/mediacoverageagreement.

fundamental part of movie premiers and award shows and fans around the world revel in the opportunity to view their favorite stars. But without the comfort of knowing that the environment is safe and that the photographs taken of them will be used only to report on the event and other matters of public interest, the number of celebrities, particularly those of high profile, willing to walk down red carpets would inevitably decline.

Additionally, while it is true that, typically, there are signs bearing language granting the event organizers the rights to use the attendees' likenesses, these rights are generally granted to the event organizers and their permitted licensees and are understood to relate to uses for purposes of the event. As described herein, those licensees, such as the credentialed photographers, willingly agree to restrictions on their rights to exploit the photographs they take. Accordingly, it cannot be said that someone's act of simply walking down a private red carpet grants blanket permission to have his or her image and name exploited where the credentialed photographers have contractually agreed to restrictions on their rights to exploit photographs taken at the event.

C. Corbis' Rights to License the Copyrighted Photographs Cannot Be Allowed to Trample the Rights of the Individuals Photographed

Although Corbis raised the issue of preemption by the Copyright Act, it was not addressed in the court's opinion. Nonetheless, it is important to understand it

when balancing Corbis' rights in licensing the copyrighted photographs against Ms. Jones' rights, as well as the extent to which she may have consented to a waiver or grant of those rights.

The United States Copyright Act, 17 U.S.C. §101 *et seq.*, defines and protects the rights of copyright holders, including the exclusive rights provided therein.[4] It also sets forth when a state law will be preempted. Section 301(a) provides that the Act shall exclusively govern "legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright… in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright…" 17 U.S.C. §301(a). This preemption is tempered by Section 301(b) which expressly provides that the Act does not "annul[] or limit[] any rights or remedies… with respect to… subject matter that does not come within the subject matter of copyright…" 17 U.S.C. §301(b).

The Ninth Circuit has adopted a two-part test to determine if a state law claim is preempted by the Copyright Act. *Laws v. Sony Music Entm't, Inc*., 448 F.3d 1134, 1137 (9th Cir. 2006); *Downing v. Abercrombie & Fitch*, 265 F.3d 994

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

(9th Cir. 2001). First, the court must "determine whether the 'subject matter' of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§102 and 103."[5] *Laws*, 448 F.3d at 1137. If it does, the court will then "determine whether the rights asserted under state law are equivalent to the [copyright holders' exclusive] rights contained in 17 U.S.C. §106."*Id*. at 1137-1138. *See also*, *Downing*, 265 F.3d 994, 1003. If both elements are met, a state law claim will be preempted.

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

Plaintiffs' claims would not be preempted by Copyright Law because they do not fall within the subject matter of copyright. It is true that photographs typically are "original works of authorship" that are "fixed in a tangible medium of expression" and are therefore generally within the subject matter of copyright. *Downing*, 265 F.3d at 1003. However, it is not the photographs that are the subject

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

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

of the claims herein. Ms. Jones' claims are based upon Corbis' commercial use of her name and likeness – neither of which is a work of authorship under 17 U.S.C §102. *Downing*, 265 F.3d at 1003. *See also*, 1 NIMMER ON COPYRIGHT § 1.01[B][1][c] (2011); J. Thomas McCarthy, *Rights of Publicity and Privacy* §11.52 (2011). "The 'work' that is the subject of the right of publicity is the *persona*, *i.e.*, the name and likeness of a celebrity or other individual [and] a *persona* can hardly be said to constitute a 'writing' of an 'author' within the meaning of the Copyright Clause of the Constitution." 1 NIMMER ON COPYRIGHT § 1.01[B][1][c] (internal cites omitted). *See also* McCarthy, *Rights of Publicity and Privacy* §11.52 ("A picture is merely the means by which plaintiff may be identifiable from defendant's unauthorized commercial usage. The picture is not 'the person.'"). As this court noted in *Downing*, this "is true not-withstanding the fact that [the] names and likenesses are embodied in a copyrightable photograph." *Downing*, 265 F.3d at 1004. *See also,* 1 NIMMER ON COPYRIGHT § 1.01[B][1][c] ("Such name and likeness do not become a work of authorship simply because they are embodied in a copyrightable work such as a photograph.").

Two cases involving the unauthorized use of photographs – *Downing* and *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005) –are instructive to this matter. The *Laws* court noted its conclusion in *Downing* that "'it is not the publication of the photograph itself, a creative work of authorship, that is the basis

for [plaintiffs'] claims, but rather, it is the use of the [plaintiffs'] likenesses and their names pictured in the published photograph.'" *Laws*, 448 F.3d at 1141. Similarly, the court noted the Seventh Circuit's conclusion in *Toney* that, notwithstanding its embodiment in a photograph,

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

Id. at 1142.

It is clear that *Downing* and *Toney* – involving the unauthorized use of individuals' personas as embodied within photographs – provide guidance in this matter. While Corbis display of the photographs is arguably necessary to its attempts to license its copyrights therein, to the extent it licenses those photographs for purposes other than legitimate news reporting or similar non-commercial purposes, the only uses that Ms. Jones anticipated would be made of the photographs she posed for, it has violated Ms. Jones' right of publicity.

Accordingly, because the rights protected by the right of publicity do not fall within the subject matter of copyright, Corbis fails the first prong of the test and, therefore, Ms. Jones claims would not be preempted. Even if the first prong was

satisfied because the persona is embodied within photographs, preemption still fails on the test's second prong. The right Plaintiff asserts – namely, the right of publicity – is not equivalent to any of the exclusive rights set forth in the Copyright Act. The right of publicity protects the commercial value in an individual's persona, regardless of the medium in which it is embodied. "Because the subject matter of… statutory and common law right of publicity claims is [individuals'] names and likenesses, which are not copyrightable, the claims are not equivalent to the exclusive rights contained in §106." *Downing* 265 F.3d at 1005. Accordingly, preemption would fail under either prong of the Ninth Circuit's test and Corbis cannot make use of the photographs in a manner far exceeding the use Ms. Jones anticipated when she posed for credentialed news media on the red carpet.

D. Neither California's Civil Code 3344(d) Public Affairs Defense nor the First Amendment Protects Corbis' Commercial Exploitation of Personalities' Names and Likenesses

Another issue raised by Corbis but not addressed by the court was the question of whether either California's statutory public affairs defense or the First Amendment extends to Corbis' exploitation of the photographs. The statutory public affairs defense, Civil Code Section 3344(d) ("Section 3344(d)"), provides that an individual's consent is not required for the use of a personality's "name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." CAL. CIV. CODE

§3344 (d). But this statutory exception and the First Amendment must not be turned into a backdoor to trample outright Plaintiff's rights. There is no dispute that freedom of the press is vital; however, "this defense is not absolute, [and] 'a proper accommodation between [the] competing concerns' of freedom of speech and the right of publicity" must exist. *Downing*, 265 F.3d 994, 1001 (quoting *Eastwood*, 149 Cal. App. 3d 409, 422 (1983)). Corbis cannot be permitted to take advantage of these defenses which are strictly set aside for the reporting and the dissemination of news and information to serve the public interest..

Corbis' online image licensing database simply does not constitute reporting of public information or news, even if some of its end-users might make such use of the photographs. As described, *infra*, Corbis licenses photographs, despite contractual restrictions to the contrary, for commercial purposes well beyond the reporting of public information or news. Any individual, including consumers, can create an account and license photographs from Corbis' vast library for myriad purposes well beyond anything in the public interest.

Corbis does not provide any news or information through its licensing database and therefore is not statutorily exempt under Section 3344(d). Rather Corbis' business is built on "unjust enrichment by the theft of [the goodwill" individuals, such as Ms. Jones, hold in their names and likenesses built through their hard work and talent as professional actors and recording actors over many

years. *Zacchini*, 433 U.S. at 576. If this Court held otherwise, the necessary and fragile balance that has long existed in protecting an individual's right of publicity with public reporting interests would be eviscerated. For these reasons, Corbis could not avail itself under the public affairs defense for using photographs of the Plaintiffs in its commercial licensing business.

California's public affairs exemption and the First Amendment would protect the manner in which the press uses the names, likenesses, and photographs of individuals in connection with news reporting and the reporting and dissemination of news and information to meet the public demand and need. In fact, the photographers who took the pictures at issue were granted access to the red carpets for just those purposes. Extending such defenses to Corbis and similar businesses, however, would devastate the protections afforded individuals by over-extending the protections exclusively reserved for reporting factual news and information to the public.

Where the uses of photographs and images qualify, press and other news media can use the images without having to obtain the depicted individual's consent. Similar rights should not be extended to Corbis and other commercial online image licensing giants when such rights are more properly addressed through contractual relationships rather than by circumventing the publicity rights of personalities such as Ms. Jones. Further, a photographed individual's consent

must not be assumed when photographs are licensed for uses far in excess of those for which the photographer was granted access to the red carpet.

E. The District Court's Decision May Open Individuals to New Forms of Exploitation.

The district court's holding could open the door to far more egregious exploitation than in the instant matter. Under this holding, there is nothing preventing a photographer from commercially exploiting, or licensing others to commercially exploit, photographs of individuals who have posed for photographs but who have not expressly consented to the commercial use of their names and images. This could be especially problematic in the case of photographs taken by ever-increasingly aggressive paparazzi who frequently put the safety and privacy of their subjects and the public at risk for photographs. If those photographs could be commercially licensed without restriction, the incentives for them to engage in such behavior would increase, further exacerbating an already problematic situation.

Similarly, many event and portrait photographers may find ways to profit from the activities for which they are retained and paid. Often, these photographers retain copyrights in the photographs they take, either expressly by contract or by omission of a written copyright transfer agreement. The subjects of those photographs agree to be photographed and may pose for the photographers, often

knowing that the photographer might distribute the photographs to other event attendees through electronic means such as photograph sharing websites or social media websites. Under the district court's formulation, because the individuals knew the photographs may be distributed widely, these photographers would then be free to commercially exploit the photographs they were paid to take – whether weddings, parties, high school proms or family portraits – without obtaining any consent from the individuals who trusted them with their intimate moments. Surely this was not district court's intent; however, the opinion in the instant matter could have just such a result.

CONCLUSION

The district court's decision failed to take into account the reasonable expectations of attendees at red carpet events and the contractual restrictions that photographers are subject to at those events. Despite the fact that some of Corbis' distribution of the photographs depicting Ms. Jones was commercial in nature, the court held that Plaintiff had broadly consented to Corbis' use of her name and likeness in its widespread distribution of those photographs. In so holding, the court opened the door to practices that could have far-reaching implications on both the nature of the right of publicity and the long-standing tradition of red carpet events.

For the foregoing reasons, the District Court's grant of summary judgment

in Defendant's favor should be reversed.

DATE: December 12, 2011

Respectfully submitted,

By: /s/ Duncan Crabtree-Ireland
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CERTIFICATE OF COMPLIANCE.

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 5,706 words, excluding those parts of the brief that the Rule exempts from the word-count limitation, which is less than the 7,000 words permitted by Fed. R. App. P. 29(d).

DATE: December 12, 2011

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

CERTIFICATE OF SERVICE

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

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

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